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Transcript Appeals.

Vol. 5.

THE

FILE OF OPINIONS

IN CASES ARGUED BEFORE THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

DURING THE

JANUARY TERM,

1868.

FROM OFFICIAL COPIES CERTIFIED BY

JOEL TIFFANY, State Reporter.

SECOND EDITION WITH ANNOTATIONS BY

JAMES G. GREENE,

ROCHESTER, N. Y.

ROCHESTER, N. Y.

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Transcript Appeals.

JANUARY TERM,

1868.

ALEXANDER HAMILTON, JR., AND MARTIN LIVINGSTON, IMPLEADED WITH WILLIAM S. GLEASON, *v.* WENDELL WRIGHT.

Attorney and Client—Authority to appear—Right of Defendant—Ejectment —Grantee's Right to sue in name of Grantor.

The law warrants a party in giving faith and confidence to one who by

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Attorney's appearance—Effect—Officers of court. 41 *N. Y.* 362; 42 *N. Y.* 31; 44 *N. Y.* 41; 65 *N. Y.* 183; 118 *N.Y.* 61 (27 *St. Rep.* 862); 165 *N. Y.* 55; 3 *Hun,* 5; 27 *Hun,* 433; 31 *Hun,* 295; 57 *Hun,* 140 (25 *Abb. N. C.* 93; 11 *N. Y. Supp.* 27; 32 *St. Rep.* 230); 60 *Hun,* 545 (39 *St. Rep.* 681; 15 *N. Y. Supp.* 335; 21 *Civ. Proc.* 42); 66 *Hun,* 259 (49 *St. Rep.* 478; 21 *N. Y. Supp.* 170); 85 *Hun,* 173 (65 *St. Rep.* 841; 32 *N. Y. Supp.* 586); 54 *App. Div.* 425 (66 *N. Y. Supp.* 840; 8 *Ann. Cas.* 323); 60 *App. Div.* 484 (69 *N. Y. Supp.* 1073); 86 *App. Div.* 395 (83 *N. Y. Supp.* 703); 5 *T. & C.* 233; 67 *Barb.* 389; 9 *Abb. N. S.* 12; 12 *Abb. N. C.* 122; 28 *Abb. N. C.* 79 (43 *St. Rep.* 149; 18 *N. Y. Supp.* 98); 25 *Misc.* 3 (54 *N. Y. Supp.* 407); 28 *Misc.* 526 (59 *N. Y. Supp.* 856); 46 *St. Rep.* 592 (19 *N. Y. Supp.* 849); 48 *St. Rep.* 588 (20 *N. Y. Supp.* 666).

Attorney—Unauthorized appearance—Remedy. 123 *N. Y.* 450 (34 *St. Rep.* 67; 19 *Civ. Pro.* 333; 26 *Abb. N. C.* 100); 2 *T. & C.* 520; 3 *T. & C.* 434; 46 *How. Pr.* 646.

Adverse possession—Effect of subsequent deed. 169 *N. Y.* 484; 34 *St. Rep.* 179 (11 *N. Y. Supp.* 868).

Land held adversely—Conveyance of—Action by grantee. 25 *Hun,* 386; 26 *Hun,* 602; 62 *How.* 184; 65 *How. Pr.* 301.

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law is authorized to hold himself out as a public officer clothed with authority to represent others in the Courts.

Where an attorney appears for a party, the general rule is, that a retainer will be presumed; and the adverse party, having no notice to the contrary, may act upon such presumption.

The object of Section 111 of the Code of Procedure as amended is to *limit the operation of the section as previously enacted,* not to create any new authority as between the grantor and grantee for the use of the name of the former by the latter to recover lands held in adverse possession.

CLERKE, J.—On the 20th of March, 1863, the Plaintiffs, Hamilton and Livingston, as trustees under the will of Margaret Livingston, deceased, conveyed a lot, consisting of about two acres, in Ulster county, to Gleason, the other Plaintiff. At the time of the conveyance, this lot was held and occupied by the defendant, Wendell Wright, claiming a title adverse to that of the grantors. After the execution and delivery of this conveyance, Gleason commenced the above-entitled action, to recover possession of this lot, and, without express authority from Hamilton and Livingston, joined with himself as Plaintiffs. On the trial, the jury, under the direction of the Court, found a verdict for the Defendant, on the ground that the premises had been for more than twenty years in the actual possession of the Defendant and his grantors, under a claim of title adverse to that of the Plaintiffs. The Plaintiffs Hamilton and Livingston, after the judgment for costs had been entered on this verdict, made a motion before the Special Term of the Supreme Court, in the Third District, that the judgment against them be vacated, on the grounds that their names had been used as Plaintiffs without authority, or, in case Gleason failed to pay the judgment, that his attorney should be compelled to do so. The motion was denied; and on appeal to the General Term, the order was substantially affirmed, although so far modified as to direct that the costs be in the first instance collected, if collectable, against the Plaintiff Gleason. The question of liability of the Plaintiff's attorneys to Hamilton and Livingston, in case the latter should have to pay the costs, was not determined, but left open. No costs were allowed to either of the parties as against the other, upon the appeal.

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By statute it is declared that "Every grant of lands shall be absolutely void, if, at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor" (1 R. S. 739, § 147, marginal). So that, of course, Gleason could not have maintained an action to recover possession of this lot, even if Wright could have shown adverse possession only for a year previous to the delivery of the deed, without uniting Hamilton and Livingston with him as co-Plaintiffs—the grant to him being absolutely void. Thus, even where the party holding the adverse possession had no sufficient defence, he would be successful in any action brought by the grantee alone.

Section 111 of the Code of Procedure, which declares that "Every action must be prosecuted in the name of the real party in interest," provides, notwithstanding, that "an action may be maintained by a grantee of land in the name of a grantor," &c., "when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant."

The question then arises, whether a grantee, under such circumstances, can maintain an action in the name of the grantors without their express authority? In my opinion no express authority from the grantors is necessary. The law gives it, moreover, by delivering a deed of the premises. While they were held in adverse possession by Wright, it may be fairly implied that the grantors consented that Gleason should be allowed to avail himself of every legal means by which he could obtain possession of these premises. By doing this they evidently must have intended that he should have possession of them, and that he should pursue the method directed by any existing law to effectuate that possession. They are presumed to be cognizant of the law.

It is highly probable that the grantors knew of the adverse possession at the time when they made the conveyance to Gleason; for it was proved at the trial that Wright had been in

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possession of the premises for twenty years. If they knew this, and at the same time intended that Gleason should not use their names to enable him to recover possession, they were guilty of great unfairness by giving him a deed that could be of no possible advantage to him. The Appellants certainly had no equity against the Defendant Wright. By making the conveyance they enabled Gleason, who is alleged to be irresponsible, to prosecute the action, and put the Defendant to costs. Their act has occasioned this injury to him, and they should not be permitted to escape without indemnifying him for it.

The modification of the order by the General Term should not be disturbed.

The order should be affirmed, with costs.

H. A. Nelson for Appellants.
T. R. Westbrook for Respondent.

WOODRUFF, J.—The general rule, that an appearance by attorney, whether for the Plaintiff or the Defendant, if there be no collusion, may be recognized by the adverse party as authentic and valid, I deem important to the safe administration of justice and well founded in the scheme and plan of such administration, whether in England or this country, ever since such officers were commissioned to represent litigants in the Courts. Receiving their authority from the Courts, they are deemed its officers. Their commissions declare them entitled to confidence, and in a just sense their license is an assurance not only of their competency, but of their character and title to confidence. The direct control of the Courts over them, as officers, by way of summary discipline and punishment to compel the performance of their duty, or to suspend or degrade them, is retained and exercised as a guarantee of their fidelity.

It is no denial of the rule, that where there are special circumstances calling for its relaxation, the Courts may and do relieve from its rigid application. The exception arising from

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such special circumstances strengthens as well as recognizes the rule itself.

Hence, when an appearance is entered by an attorney, without authority, the inquiry whether such an attorney is of sufficient responsibility to answer for his unauthorized conduct to the party injured thereby, is entertained.

And it may be proper always to inquire whether the injury to the party is irremediable, unless such appearance be set aside, and the proceedings founded thereon vacated.

In the exercise of their general equitable control over their own judgments, the Courts may and should consider whether they can relieve the party for whom an unauthorized appearance is made, without undue prejudice to the party who has in good faith relied upon such appearance, and the official character of the attorney who appears.

But it would be at variance with the scheme and plan upon which we universally administer the law, if a Defendant could be prosecuted by a responsible attorney, in full authority to practice in our Courts, and after having successfully and in good faith defended, as the case might be, through all the tribunals of justice, and to final judgment in the Court of last resort, be required to submit to an order setting aside the proceedings, and be left to be again prosecuted for the same cause of action, on the *mere ground* that the Plaintiff's attorney had no authority from the Plaintiff to bring the action.

The law which gives to attorneys their commissions must be deemed to guarantee to Defendants protection against such a result, and at the same time the rule should yield to equitable considerations, where they arise, and should permit the Courts to give relief when they can thereby prevent irremediable wrong to either party.

And if it be asked, Why should the party for whom he appears be left to seek his remedy against the attorney? Why should not the party who has been subjected to an unauthorized litigation pursue that remedy, rather than cast that hazard and burden upon one who has done nothing to deserve it?

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The answer lies in the suggestion already made, that the law warrants a party in giving faith and confidence to one who by law is authorized to hold himself out as a public officer, clothed with power to represent others in the Courts; and besides this, the consequences of the contrary rule would often be altogether disastrous.

Evidence would be lost; witnesses die; the Statute of Limitations bars claims; and death of parties themselves might often happen. In various ways, to set aside proceedings at the end of a protracted litigation would be to work inevitable wrong to the party who had relied upon an appearance.

It is said that proof of the authority by the attorney to appear and prosecute should be demanded, if the party would be safe.

If such demand could in all cases be insisted upon, it would be only one step towards safety. It might often be practically ineffectual. Ex parte evidence of authority might be produced, and yet, if the party might afterwards impeach it, the question would again arise in all its force. Besides, it is not the practice to require attorneys to produce their authority, except in special cases. No doubt there is power in the Courts to order it. It has sometimes been done (The Ninety-nine Plaintiffs *v.* Vanderbilt, 4 Duer, 632).

When, pending a litigation, the authority of the attorney to appear is denied, and application is made in due season, the Court, if probable cause appears, would in general protect the party applying.

Still the general rule remains, that a retainer will be presumed, and the adverse party, having no notice or ground of suspicion, may act on that presumption (3 Merivale, 12; 2 Mylne & Keen, 1; 1 Ves. Jr. 196; 6 Johns. 297; 9 Page, 496).

And in general, where there are no circumstances of suspicion, or facts indicating fraud, and no evidence of bad character discrediting the appearance, the Courts do not require a

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reputable and responsible attorney to exhibit his authority to appear (see 6 John. 34; 5 Duer, 643).

It is, however, suggested, that as in ejectment the Defendant is authorized by statute to require the attorney for the Plaintiff to produce his authority (2 Rev. Stat. 305), this action should be deemed an exception to the general rule, and it be held that the Defendant's own laches have caused his misfortune, if it afterwards appears that the Plaintiffs did not authorize the suit.

But it is obvious that the statute itself does not furnish complete protection. It only makes the production of apparent written authority, sustained by the affidavit, presumptive evidence. And if the authority does not actually exist, the same question will arise in ejectment as in other actions—How far is the Plaintiff bound by the appearance of an attorney for him? And as respects an appearance for a Defendant, the statute makes no provision.

I do not think, therefore, that the omission of the Defendant to demand the production of authority, where he has nothing to put him on his guard, awaken his suspicion, or to lead him to distrust the good faith of the attorney who prosecutes the action, should change his right to insist upon his judgment, when it is not claimed that the attorney is not of full and sufficient responsibility to answer to the Plaintiff for any costs or other damage he may have sustained.

In Bean *v.* Mather (1 Daly, 440) the Court do no more than exercise their general discretion to open a judgment and let a Defendant in to plead under special circumstances, in which it was equitable and proper, although it is quite true that observations are made, in the opinion of the Court, in derogation, of the justice of the rule I have been considering, and, as I think, overlooking its proper foundation and the policy of its general maintenance. It is at least doubtful whether the Code of Procedure, as amended in 1862, affects the question on either side.

It was settled before the Code was adopted, that a deed of

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lands held in adverse possession was good against the grantor and his heirs, and against strangers, though void as against the party in possession of the lands at the time of its execution; that being void to the latter, the grantor could maintain the action to recover the possession, and the grantee could not, but that a recovery in the name of the grantor enured to the benefit of his grantee (Jackson *v.* Demont, 9 Johns. R. 55; Williams *v.* Jackson, 5 id. 489; 1 Johns. R. 159; 9 Wend. 516; 15 id. 164; Livingston *v.* Proseus, 2 Hill, 526).

When, therefore, the Code had, in section 111, provided that "Every action should be brought in the name of the real party in interest," a doubt arose whether an action to recover lands thus conveyed could be brought by any one. If brought in the name of the grantee, he could, as against the party in possession, show no title; for or against such party, his deed was void. If brought in the name of the grantor, it might be shown that he was not the real party in interest, because, if he recover, his recovery would enure, not for his own benefit, but for the benefit of the grantee.

The Code was therefore amended so as to exclude such a conclusion, by adding to the section the provision that "an action may be maintained by a grantee of land, in the name of a grantor, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant."

The purpose was, I think, to limit the operation of the section as previously enacted, and not to create any new authority as between the grantor and grantee for the use of the name of the former by the latter.

If by reason of the giving of the deed such authority was to be implied, very well; if not, I do not think the Code conferred it.

To the suggestion that the deed was given by the Appellants as executors, and such a deed did not warrant an action in the name of the Appellants as individuals, it must suffice to say that the Appellants have not seen fit, in their motion-

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papers, to set out the will under which they convey; and the deed itself is apt to convey their own estate in the premises, and does not show that in giving the deed they were executing a naked power.

I think the order of the Supreme Court, requiring the Defendant to first endeavor to collect the costs from the grantee Gleason, was all to which the Appellants were entitled.

The order must be affirmed.

Affirmed.

JOEL TIFFANY,
State Reporter.

THE COLUMBIAN INSURANCE COMPANY, RESPONDENT, *v.* SAMUEL STEVENS ET AL., APPELLANTS.

Costs—Liability of Receiver to pay in full out of Assets—Preference over General Creditors.

In an action prosecuted by a receiver of an insolvent corporation, for the collection of an alleged money demand, for the enhancement of the fund, and for the benefit of those to whom it is ultimately to be paid, on failure to sustain such action the Defendant is entitled to his costs, to be paid to him immediately. He does not stand as a general creditor, and is not required to await the final administration, receiving only his pro rata with the other creditors.

It is not in accordance with any rule of justice or equity toward third parties that such actions should be prosecuted by a company or its representative, otherwise than at the expense and risk of the fund which is thereby sought to be increased.

The Defendant being entitled to his costs immediately from the *fund,* and the motion being to require the receiver to pay such costs from the fund, it did not rest in discretion to refuse such order.

To make such order is not giving a preference to the Defendant in the

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Costs—Liabiltiy of assignee or representative—Priority. 58 *N. Y.* 609; 12 *Abb. N. S.* 255; 11 *Abb. N. C.* 150 (65 *How. P.* 244) ; 37 *Misc.* 474 (75 *N. Y. Supp.* 1057) 3. *Dem.* 298; 4 *Dem.* 523; 2 *Con.* 43 (8 *N. Y. Supp.* 652;) 12 *Civ. Proc.* 34.

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payment of a debt; it is merely requiring the fund to bear and pay the expense incurred for its own benefit or increase.

APPEAL from an order of the Supreme Court, duly affirmed by the General Term in the First District. This action was commenced by the Plaintiff on the 9th of January, 1866, but on the 23d of the same month, and before the Defendants appeared, receivers of the Plaintiff's property were appointed by the Supreme Court, and the action was prosecuted by the receivers and their successor to trial. The action was an ordinary suit at law for the recovery of money only. On a trial before a referee the Defendants obtained a report, upon which judgment was entered for their costs of suit.

The Defendants thereupon applied by motion for an order that the receiver pay such costs out of funds in his hands, showing by affidavit that he had funds in his possession, as such receiver, to a much larger amount. The nature of the receivership was not shown by the papers, nor does it appear to what extent there are claims of creditors or others to the funds in the hands of the receiver.

The motion was denied at Special Term, and the order was affirmed in General Term.

The Defendants appealed to this Court.

Ira D. Warren for Appellants.
T. G. Shearman for Respondent.

WOODRUFF, J.—The right of the Defendants to have judgment for their costs in such an action as the present, brought against them for the recovery of money only, is absolute, as well by the law before as since the Code of Procedure.

There is no claim nor ground of claim that the allowance of costs in the action was discretionary. The liability of the receiver, in whom the alleged cause of action became vested after the summons herein was served, and by whom the action was prosecuted, is made, by section 321 of the Code, the same as if he had caused himself to be made a party. The questions here are, therefore:

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First. In actions prosecuted by receivers for the collection of alleged money demands, instituted or carried on for the enhancement of the fund, for the benefit of those to whom it is ultimately to be paid, is the Defendant entitled to costs to be paid to him immediately, or must he stand as general creditor, to await the final administration, and receive only (as the case may be) his distributive share of the fund, pro rata with those for whose benefit he has been subjected to a groundless litigation?

Second. Is the question stated addressed to the discretion of the Court, in such sense that no appeal lies to this tribunal from the decision made below?

It was conceded on the argument that the costs in question are chargeable upon and are to be collected out of the fund. This could not well be denied; and yet, in a case in which it does not appear by anything stated in the papers that there are other claims on that fund of any sort, except the interests of the stockholders of the company, it would seem to follow, as of course, that the receiver should have been directed to pay those costs. Such an order is the appropriate mode of reaching funds in the receiver's hands. Not being in form a party to the action, no execution could reach the property he holds; and being the custodian of the fund, as an officer of the Court he is subject to immediate direction to pay it to a party entitled.

If it be assumed that the company was insolvent, and that the funds which the receiver holds, or may collect, may not prove sufficient to satisfy all the creditors of the company, this does not, in my opinion, upon clear and just rules governing the subject, impair the Defendant's right to be paid in full—the fund being confessedly sufficient. The receiver is, pro hac vice, the representative of the company, its creditors and stockholders. The action is prosecuted for the increase of a fund which is to be paid to them. It is not according to any rule of justice or equity to third parties that actions like the present should be prosecuted by the company, or such repre-

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sentative, otherwise than at the expense and risk of the fund which it is sought thereby to increase.

In my opinion the right of the Defendant to this protection and indemnity against groundless prosecution is clear, and it is not necessary to invoke the 317th section of the Code for its maintenance, further than to say that its provisions warrant the charge of these costs upon the fund, and such charge should be absolute, and proir to the claims of those for whose benefit the action is prosecuted, if the rules of equity require it.

Whether that section imperatively entitles the privileged party to such priority of payment in all cases mentioned in that section, it is unnecessary in this case to decide.

If the views thus expressed are in conformity with established rules relating to the subject, as they are, in my judgment, conformed to what is obviously just, then it was not a matter of discretion to refuse the order sought.

The rule was applied by Chancellor Walworth to a case like the present, in which it did appear that the corporation was insolvent (Camp v. The Receivers of the Niagara Bank, 2 Paige, 283), where the receivers continued the prosecution of a suit at law which was *at issue* before their appointment. In giving his opinion he says: "If the receivers did not think it for the interest of the creditors to run the risk of having the costs charged upon the fund, they should have abandoned the suit, and then the petitioner would only have been entitled to share ratably with the other creditors. The petitioner is entitled to his costs down to the time of the nonsuit, to be paid out of the fund in the hands of the receivers;" and he made an order to that effect.

In my opinion the scheme and principle proposed by the chapter of the Code in relation to costs is, that when costs are allowed they shall be paid by the fund or party that would be benefited by a counter-judgment, and that this case is not within any exception to the rule.

To the suggestion that the statute (2 Rev. Stat. 470, § 79)

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will not permit the preference sought, it must suffice to say that it is not sought to give a preference to the Defendants in the payment of a debt of the company, *as such;* it is to require the fund to bear and pay an expense incurred for its own benefit or increase.

Nor is it any answer to say that Defendants often fail to collect their costs of a successful defence, where the Plaintiff is insolvent, and therefore the order made below works no unusual hardship.

Where the Plaintiff has funds the Defendant is *always* entitled to collect, and does collect his costs; here the beneficial party Plaintiff has funds. It may be said that this rule places it in the power of receivers to waste the whole of the assets in their hands in groundless litigation, and successful Defendants are paid their costs while creditors may get nothing. On that subject I answer, when the receiver's accounts are passed there will be abundant opportunity for creditors and others to inquire whether he has acted with due regard to their interests, and the right to require that he personally pay costs which he ought not to have incurred, is not confined to the parties to the actions (Colvard *v.* Oliver et al., 7 Wend. 497).

The question whether an unusual allowance was or was not made to the Defendants is not before us; we must assume that the case called for it.

The order appealed from should be reversed.

Reversed.

JOEL TIFFANY,
State Reporter.

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BUFORD A. TRACY v. THE FIRST NATIONAL BANK OF SELMA.

Attachment—Foreign Corporation—Motion to vacate—Appealable Order—Receiver of Insolvent Corporation—Standing in Court.

Where a warrant of attachment has been duly issued and served upon assets of a foreign corporation within this State, and a receiver of such corporation has been appointed, who has entered upon the duties of his office, and where such receiver appears in the Supreme Court at Special Term, and makes application for an order upon Plaintiff in attachment to show cause why such receiver should not be made a party to the proceedings in attachment, and why the warrant of attachment should not be vacated, which motion upon hearing is denied, and which denial is affirmed on appeal to the General Term,—on appeal to the Court of Appeals, held, the receiver had no standing in Court, and that his appeal should be dismissed; that such order was not an appealable one.

ON the 12th day of April, 1867, a treasury draft for $75,000 was presented at the Defendant's counter, at Selma, Alabama, and payment refused by the bank, from want of means to pay the same. The Defendant was an incorporation, organized under the statutes of the United States passed June 3d, 1864, and, as a depositary of the United States Government, had received its funds to an amount exceeding the sum of $75,000. On the 15th day of the same April, without knowledge of the above refusal, and for value paid, the Plaintiff received from the said bank its eight several checks on the Ocean National

Receivers—Corporations—Suits by and against. 67 *N. Y.* 299; 6*Hun,* 297; 7 *Misc.* 361 (58 *St. Rep.* 686; 27 *N. Y. Supp.* 636.)

Receiver—Motion in action—Necessity of being made party. 73 *N. Y.* 574; 85 *N. Y.* 245; 89 *N. Y.* 441; 44 *How. Pr.* 234; 62 *How. Pr.* 425; 24 *St. Rep.* 617 (2 *Silvr S. Ct.* 349; 17 *Civ. Proc.* 342; 5 *N. Y. Supp.* 681.

Jurisdiction—Admission. 14 *Misc.* 22 (69 *St. Rep.* 496; 35 *N. Y. Supp.* 124).

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Bank of New York, amounting in the aggregate to $8,500. The checks were presented for payment at the Ocean Bank on the 27th of April, which was refused, under instructions from the Treasury Department. Due notice of such refusal was given the Defendant. On the 29th of April the Plaintiff commenced an action against the Defendant to secure the amount of the said checks, and procured an attachment to be issued, and to be levied upon a sum of money standing to the credit of the said Defendant in the Ocean Bank.

On the 15th day of the same April, the bank at Selma was taken possession of "by the military authorities of the United States," and its assets remained in such possession until Mr. Cadle was appointed a receiver of the said bank, under legal proceedings commenced about May 1st, 1867. He at once entered upon the execution of his duties as such receiver.

On the 14th of August, 1867, due application on behalf of said receiver was made at the Special Term in the city of New York, requiring the Plaintiff to show cause why the receiver should not be made a party to the proceedings, and why the warrant of attachment should not be vacated. Upon the hearing, it was ordered that the motion to vacate the order of attachment be denied, and no notice was taken of that part of the order asking that the receiver be made a party to the proceedings.

Upon appeal to the General Term of the First District, this order was approved, and the receiver now appeals to this Court.

The Plaintiff asks to dismiss this appeal on the ground, 1st, that the receiver has no standing in Court to authorize him to bring an appeal; 2d, that the order is not appealable; 3d, on the merits.

S. Chittenden for Appellant.
Eugene Smith for Respondent.

HUNT, CH.J.—I am of the opinion that the objection that this order is not appealable to this Court is not valid. The re-

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ceiver insists that as a matter of law, and of strict right, the attachment in this case was illegal; alleging that the Defendant is not a foreign corporation within the statute, and also that the cause of action does not arise in this State, and also that the priority of the United States claim renders the attachment invalid. He bases his objection upon strict law and a claim of right, conceding that he cannot control or influence the direction of the Court below. In such case the order has frequently been held to be appealable to this Court (King *v.* Platt, 37 N. Y. Rep.; People *v.* N. Y. C. R. R. Co. 29 N. Y. R. 418; Wakeman *v.* Price, 3 Coms. 334; Buffalo Savings Bank *v.* Newton, 23 N. Y. R. 161). In the first two cases the appeal was sustained, and in the last two it was not sustained, on the ground I have mentioned.

The objection that the receiver has no status in Court I regard as fatal. The action was commenced against the bank before the appointment of a receiver, and, as far as the papers show, is still in progress under that title. There is no legal objection to its continuing in that form until final judgment is obtained, and such is the common practice in this State.

It was competent to the receiver to apply to make himself a party, either on the ground that all the interest of the Defendant had become vested in him, or that the rights of all the parties could not be settled, unless he should be made a party to the action. He made such an application, but, for some reason unexplained in the papers, took no order on that branch of the case. There is no ground on which the receiver can directly interfere in such a case, by giving notice of a motion, and conducting an appeal, whether we concede the right of the Plaintiff to continue his suit against the Defendant in its own name, or whether it be conceded that upon the dissolution of the corporation, the receiver became the necessary party Defendant, or the legal successor of the Defendant. A motion to dissolve an attachment, like any other motion in a suit, can only be made by a party to the same.

During the life of a Defendant, all motions on the part of a

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Defendant must be made in his name. Upon his death, or upon the dissolution of a corporation (when the suit is not continued against it by name), an executor or receiver must be appointed, and must apply to the Court to be made a party to the suit, asking an order that the same may be continued in his name. In neither case can he appear or move until such an order is obtained. He is a stranger to the proceeding.

The receiver has no status in Court to make the motion below, or to appeal to this Court.

The Judge proceeds to discuss the questions raised upon their minds respecting the application. There was a difference of opinion among the Judges upon some points, and the decision was placed upon the express ground that the receiver had no status in Court which would justify him in making the motion below, or brining an appeal to this Court. Appeal dismissed, with costs.

All concur.

Dismissed.

JOEL TIFFANY,
State Reporter.

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JANE BALDWIN, EXECUTRIX, AND ,W. B. HAWLEY, EXECUTOR OF ALPHEUS BALDWIN, DECEASED, APPELLANTS, *v.* NORMAN VAN DUSEN, RESPONDENT.

Promissory Note—Consideration—Genuine Note—Infancy of Maker—Answer—Proof of Fraud.

Under an answer which alleges as a defence, a fraudulent sale of a note with a representation that it, the note, was good, the defence is not established where no fraud is proved by testimony which only shows a warrantee *that the note was genuine,* especially where it is also found that the only defect in respect to the note is, that it was made by an infant.

A note made by an infant is a sufficient consideration to sustain a promise or contract for its purchase.

WOODRUFF, J.—I think it is quite clear upon the proofs that the representation made by the Plaintiff, at the time of the sale of the note, amounted to a warrantee that the note was free from any such defect as the infancy of the maker.

It amounted, according to its fair interpretation, to an undertaking that it was a binding obligation.

And therefore I think that the Supreme Court properly granted the new trial, and might have placed their decison on the ground that the referee erred in his finding of facts.

But the order of reversal does not state that the judgment was reversed upon the facts, and without that this Court has jurisdiction to consider only whether, upon the pleadings and facts found, the judgment was erroneous.

The answer of the Defendant sets up a defence—

A denial that he made and delivered the note in suit.

Sales—Express warranty—Exclusion of implied. 72 *Hun.* 260 (55 *St. Rep.* 334; 25 *N. Y. Supp.* 574).

Contract—Mistake—Recission. 43 *N. Y.* 163; 37 *Hun,* 25.

Infancy—As defense. 43 *St. Rep.* 70 (17 *N. Y. Supp.* 188).

Appeal—Failure to state that reversal was upon facts—Effect. 40 *N. Y.* 256; 46 *N. Y.* 581.

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That the consideration of the note was the note of Onley, an infant, sold to Defendant by the Plaintiff.

That Olney refuses to pay it on the ground of infancy.

That Plaintiff, at the time of the sale, represented the note of Onley to be good.

That the Defendant was ignorant of the infancy of Onley, and that *Plaintiff knew* and *fraudulently* concealed the fact of Onley's infancy, and represented the note to be good, for the purpose of inducing the Defendant to purchase it without further inquiry.

First. There is no allegation of mutual mistake, and claim to rescind upon that ground.

The answer, by alleging knowledge and fraudulent concealment by Plaintiff, expressly denies any claim or pretence of mutual mistake. Without an amendment the referee could not have sustained such a defence, even if the failure of the Defendant to *allege* a rescission and offer to return could have been obviated.

Second. The utmost that the answer amounts to (the making of the note sued upon being proved) is—1, that there was no sufficient consideration for Defendant's note, or that the consideration has failed; 2, that by a false and fraudulent representation the Plaintiff made the sale and procured the Defendant's note; or, *possibly,* 3, that the representation amounted to a warrantee.

As to the first. The note of the infant was a sufficient consideration (in the absence of fraud or warrantee) to uphold the promise of the Defendant.

If the transaction was in all respects fair, the purchaser may, if he will, take upon himself the hazard or chance that the infant will pay the obligation or note which he has signed; and if he chooses to pay or promise to pay therefor he will be bound (see cases cited: Roof *v.* Stafford, 7 Cow. at p. 181; and see also Slocum *v.* Hooker, 13 Barb. 536).

Second. The finding of the referee expressly denies and excludes the defence of fraud. He finds that neither of the

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parties, at the time of the sale, had any knowledge of the infancy of Onley.

Third. If the answer can, by a very liberal extension of its most obvious intent and meaning, be held to warrant proof of a wanantee, then, 1st, it is only a special warantee that "the note is good," that is alleged, and the finding of the referee does not sustain this allegation. 2d. If the sale alleged in this answer would, ex vi termini, import a warrantee that the maker was legally bound to pay the note (which I cannot concede), still the finding of the referee that "the Defendant agreed that the note of Onley was a *genuine* note, and not otherwise," forbids any implication of any other warrantee.

If the finding that he warranted the note to be a genuine note would not (as I think it would) alone prevent an implication that he also warranted its validity as a binding obligation, the finding of the referee that he did not agree further or otherwise does forbid such implication.

As already remarked, the question whether the finding of the referee is sustained by the proof is not before us. We may therefore, for illustration, suppose, in support of the finding, that on the trial it was proved that at the time of the sale the Plaintiff expressly stated that he warranted the note to be the genuine note of Onley, but that it must be distinctly understood that he made no other agreement or undertaking in respect to it.

This is in harmony with the finding of the referee, and, if sworn to, there would be no room for any implication of any other warantee than the warrantee that the note was genuine —and this is the legal effect of the finding.

It only remains to consider whether, under an answer which alleges as a defence a fraudulent sale of a note with a representation that it is good, the defence is established where no fraud is proved, and the representation is found to be a warrantee that the note is the genuine note of Onley, it being also found that the note was made by Onley, and the defect therein arises from his infancy.

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Waiving any discussion of the question whether, under the pleadings, a mere breach of such a warrantee can be insisted upon as a defence, I think the conclusion of the referee, that proof of Onley's infancy did not show a breach of that warrantee, was correct.

The term "genuine" imported nothing in regard to the collectibility of the instrument, or in regard to its legal effect or operation, other than according to its usual and ordinary meaning, viz.: that the note was *not false, fictitious, simulated,* spurious, counterfeit, or, in short, that the apparent maker did make and deliver the note offered for sale.

In reference to bank bills, bills of exchange, promissory notes, and securities for money, the natural and general, if not the universal antithesis or opposite of genuine, is "counterfeit."

Hence, if we say of a bank bill, it is a *genuine bill*—i. e., not a counterfeit bill—we represent nothing in regard to the legal validity of the bill in any other respect, or of the ability of a holder to collect anything thereon.

I regret to say that, upon the finding of the referee on the facts, the conclusion of law that the Plaintiff is entitled to recover was correct.

I say it with regret, because I think it was a proper case for a reversal upon the evidence; but if the party seeking to sustain the order does not see to it that the whole question is brought before us in a form that enables us to look into the proofs, though we may regret it, we are powerless to relieve him from the consequences.

The order granting a new trial must for these reasons be reversed.

All concur.

Reversed.

JOEL TIFFANY,
State Reporter.

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SAMUEL N. BASS AND JOSHUA CLARK v. JOHN K. COMSTOCK.

Pleading—Complaint—Joinder of Causes of Action—Demurrer—Motion to strike out Complaint.

Distinct causes of action which may be united in the same complaint, must be separately stated, according to § 167 of the Code. But in such case distinct causes of action not being separately stated, the remedy is by motion, and not by demurrer.

An omission to separately state, by distinct counts in the same complaint, separate causes of action which may be joined in the same complaint, is not a misjoinder under § 172 of the Code.

MASON, J.—The demurrer in this case was properly stricken out, and judgment given for the Plaintiff. There is no misjoinder of causes of action. There are two causes of action upon two promissory notes, well stated in the complaint; but the accusation against the complaint, as I understand it, is that these causes of action are not separately stated, as required by section 167 of the Code. This section does declare that the causes of action must be separately stated; but the better opinion seems to be that such causes of action are not improperly united, simply because they are not separately stated by the pleader (Dorman *v.* Kellam, 14 How. Pr. R. 184; 1 New York Practice, 367; Gooding *v.* McAlister, 9 How. Pr. R. 123; Robinson *v.* Judd, 9 How. R. 378; Peckham *v.* Smith, 9 How. Pr. R. 436). These cases, and others which might be referred to, hold that a demurrer does not lie to a complaint for not separately stating two or more causes of action, they being such as might be properly united in one complaint, if

Pleading—Misjoinder—Remedy. 30 *Misc.* 395 (62 *N. Y. Supp.* 392); 54 *N. Y. Supp.* 464 (27 *Civ. Proc.* 244.)

Pleading—Failure to separately state and number causes—Remedy. 60 *N. Y.* 429; 61 *N. Y.* 496; 41 *Hun,* 259 (4 *St. Rep.* 155); 5 *Abb. N. C.* 281; 55 *How. Pr.* 203.

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properly and separately stated; but that the remedy of the Defendant is by motion.

The following are cases which hold that a demurrer for such a defect in the complaint will lie and is the proper remedy: 8 How. Pr. R. 177; 9 How. Pr. R. 198; 4 How. Pr. R. 226, 228; 5 How. Pr. R. 171; 11 How. Pr. R. 27. These cases hold that several causes of action are improperly united when they are not separately stated, as required by section 167 of the Code. The decided weight of authority in the Supreme Court, however, is the other way, and the better reason is that when the causes of action are such as may be united in the complaint, that a demurrer will not lie in such a case. It must be borne in mind that section 167 allows the causes of action upon these two notes to be joined in the same complaint, but it declares that they must be separately stated. If we turn to section 144 it will be seen that a demurrer can only be interposed for the causes stated in that section, none of which touch this case, unless it is the 5th sub. of that section, and which is, that several causes of action have been improperly united—that is, improperly united in the complaint. This section 144 states that the Defendant may demur to the complaint when it should appear upon the face thereof that several causes of action have been improperly united. Now, section 167 declares that these causes of action may properly be united in the same complaint, and the injunction imposed upon the pleader, that such causes of action should be separately stated, is a rule of pleading, and which has been violated where this is not done; but I am not able to perceive how it can be said that the causes of action have been improperly united in the complaint.

Now, section 144 does not say that a demurrer may be interposed to the complaint where there are several causes of action, which may be properly joined under section 167, because they are united in one count, and not separately stated. The demurrer is not given for uniting in one count separate causes of action, but for uniting in the complaint causes of ac-

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tion which it is not lawful under section 167 to unite in the same complaint. It is true the pleader in this case has violated a rule of pleading enjoined by this same section. It does not follow, however, that this demurrer can be maintained. There are other rules of pleading presented by the Code, the violation of which will not give the Defendant his demurrer.

This view is greatly strengthened by the last paragraph of section 172 of the Code, which makes it the duty of the Court, when a demurrer to the complaint shall be sustained, because of the misjoinder of causes of action, to order them to be separated, and that they be proceeded with as separate actions.

I advise the affirmance of the judgment.

All affirm.

JOEL TIFFANY,
State Reporter.

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THOMAS MAHER ET AL. v. RICHARD F CARMAN.

Appeal—Rules of Court—Absence of Counsel.

The 25th rule of this Court was not intended to impose upon the Judges the duty of acting as counsel for the party who does not appear to prosecute or defend, but to save to parties acting in good faith a further opportunity of presenting a printed brief, and save to the Court the loss of time incident to motions to open judgments, etc.

WOODRUFF, J.—The exceptions taken in the progress of the trial in this case are very numerous. A very large portion are exceptions taken by the Plaintiff (the Respondent); others by the Appellant; and as to many others, the case does not state, in terms, by which party the objections were made, or which party took the exceptions. By diligent and laborious examination, that can, doubtless, be learned. The case is full of objections upon which no rulings appear, and of matter of conversation or discussion in no sense relevant to any review of the proceedings. The case bears the appearance of being a copy of all the minutes of the stenographer, in the language and with the memoranda which he took on the trial. The charge of the Judge is given in full, notwithstanding there are no exceptions taken thereto which bring it or any part of it under review. There does not appear even the apology for this, that it was made the ground of a motion for a new trial on the whole case, which might explain, though it would not justify the presentation of the Appellant's exceptions in this form. With this gross violation of the rules of the Supreme and other Courts (including the Court in which the cause was heard on appeal) it was doubtless the province of the Court below to deal.

But we may properly say, as was said by Bronson, Ch.J., in Price v. Powell (3 Coms. 322): "If it be proper to review such a case, every doubt about facts should be turned against the party making the bill."

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When to this apparent effort to obtain the delay which an appeal would secure, and yet advised of the labor and expense involved in a proper performance of the work undertaken, there is added that the Appellant fails to appear or to submit any brief or points, the inference is not extraordinary that he has himself no confidence that any ground exists for disturbing the judgment. The 25th rule of this Court was not intended to impose upon the Judges the duty of acting as counsel for the party who does not appear to prosecute or defend, but to save to parties acting in good faith a further opportunity to present a printed brief, and save the Court the loss of time formerly consumed in hearing motions to open defaults.

The judgment should be affirmed with ten per cent damages.

Affirmed, with ten per cent damages.

JOEL TIFFANY,
State Reporter.

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JAMES W. PAIGE ET AL., RESPONDENTS, v. JAMES S. WILLETT, ADMINISTRATOR, &C., OF JAMES C. WILLETT, LATE SHERIFF, &C., APPELLANT.

Execution—Sheriff's liability for Interest—Failure to pay over or Deposit.

On the receipt of an execution issued upon a judgment, the Sheriff is required to proceed to collect the debt and interest from the rendition of the judgment; and, having collected the same, it was his duty forthwith to pay over to the Plaintiff in execution, or to his attorneys, the amount so collected.

When the circumstances require it, he may bring the money into Court, that the Court may order to whom it shall be paid.

But neither paying the money to the proper party in execution, nor bringing it into Court, he will be chargeable with the amount collected, and the interest due thereon from the time of the collection of the same, and the necessary costs of compelling such payment.

WOODRUFF, J.—The complaint alleges the recovery of judgment, in favor of the Plaintiffs, against Lewis O. Wilson and others, on the 5th of August, 1858, and the issuing and

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Pleading—Answer—Admission. 90 *N. Y.* 115; 116 *N. Y.* 419 (26 *St. Rep.* 857); 128 *N. Y.* 628 (40 *St. Rep.* 353; 3 *Silvr. Ct. App. Dec.* 529); 135 *N. Y.* 361 (48 *St. Rep.* 541); 7 *Hun,* 485, 680; 46 *Hun,* 4 (11 *St. Rep.* 96; 27 *Week. Dig.* 283); 11 *App. Div.* 398 (42 *N. Y. Supp.* 369); 24 *App. Div.* 484 (48 *N. Y. Supp.* 1041); 35 *App. Div.* 577 (55 *N. Y. Supp.* 139); *D.* 90 *App. Div.* 101 (86 *N. Y. Supp.* 170); 107 *App. Div.* 227 (94 *N. Y. Supp.* 1061); 55 *How.* 179; 1 *How. N. S.* 516; 11 *Abb. N. S.* 322; 1 *Abb. N. C.* 84; 13 *Misc.* 516 (69 *St. Rep.* 113; 34 *N. Y. Supp.* 947); 27 *Misc.* 772 (57 *N. Y. Supp.* 763); 41 *Misc.* 123 (83 *N. Y. Supp.* 972); 43 *Misc.* 613 (88 *N. Y. Supp.* 285); 39 *Super Ct.* 3; 39; 44 *Super. Ct.* 56; 7 *Daly,* 82; 45 *St. Rep.* 636 (18 *N. Y.* 463); 48 *St. Rep.* 521.

Sheriff—Execution—False return—Defenses. 42 *Hun,* 126 (3 *St. Rep.* 390; 25 *Week. Dig.* 242); 62 *How. Pr.* 277; 40 *Super. Ct.* 32; 3 *Civ. Proc.* 91; 79 *App. Div.* 110 (79 *N. Y. Supp.* 520).

Sheriff—Execution—Liability for interest. 103 *N. Y.* 509 (1 *Civ. Proc.* 371); 3 *St. Rep.* 682; 25 *Week. Dig.* 89.

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delivery of an execution thereon to the original Defendant (the intestate), then Sheriff, &c., on the same day. This was not admitted by the answer. The complaint further and fourthly averred, that within sixty days after the receipt of the said execution, the Defendant, as Sheriff, by virtue therof, levied on personal property of Wilson, one of the judgment-debtors, which he had theretofore attached, and collected for the Plaintiffs $8,753.36, with interest from the date of the judgment, besides his fees and poundage.

The answer admits that the Defendant received a paper purporting to be an execution based upon the alleged judgment, and that he collected thereon the amount as mentioned in the fourth subdivision of the complaint.

There is no *denial* that he received the execution as alleged. An admission that he received what purported to be an execution is consistent with the allegation in the complaint, that there was delivered to him on the day alleged, an execution on the alleged judgment. When, therefore, the Plaintiffs, on the trial, produced the judgment record, proved a recovery as alleged in the complaint, the Plaintiffs, by the pleadings and such evidence, had established that they did recover a judgment for $8,753.36 against Wilson and others on the 5th of August, 1858, and on that day issued and delivered to the Defendant an execution thereon, and that within sixty days thereafter the Defendant levied on the personal property of one of the debtors (Wilson), and collected on the execution $8,753.36, with interest from August 5th, 1858, besides his fees. Quite unnecessarily, I think, the Plaintiffs went further, and produced and put in evidence the execution itself, endorsed, "Received, August 5th, 1858," and with a receipt or certificate also therein, endorsed, "Received on the within execution $8,-753.36, as within I am commanded. J. C. Willet, late Sheriff." True, this certificate says nothing about interest, but this was not inconsistent with the admissions in the answer. And it may import a collection so soon after the receipt of the execution that interest had not accrued to any material amount, or the term, "as within I am commanded," may import that

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he has collected that sum with the interest, fees and poundage, as required for the satisfaction of the judgment which he was commanded to satisfy.

At all events, the answer and proofs are ample to charge the Defendant with such duty as resulted from the receipt of an execution on the 5th day of August, 1858, and the collection of the amount with interest.

That duty plainly was forthwith to pay over to the Plaintiffs, or their attorney, the amount; or if the circumstances of the case warranted him in so doing (as to which the pleadings raise no question), to pay the money into Court, for the Plaintiffs and in satisfaction of their judgment.

If this duty was neglected, he was liable to the Plaintiffs for damages, which would be the interest on the money and any necessary costs of compelling such payment.

The Defendant was therefore put to showing a sufficient legal excuse for not paying over the money. He was, as above stated, concluded by his admission, and could not claim that he had not collected the amount of the judgment on the execution, and out of the property of the judgment-debtor. And this renders it wholly unnecessary to consider the special transactions between the Defendant's deputy and the assignee of the judgment-debtor.

If, in truth, the Defendant had not received the money as payment of the execution debt, but the deputy had merely received a check as security, or by way of indemnity, the answer should have denied that he had collected the money on the execution. In such case, and had the proofs clearly shown that the money was not collected, or that the Sheriff never received it upon terms that made it his duty to apply it on the execution, or that he did not receive it upon terms which made it his right or duty to apply it on the execution until the pending motions were disposed of, a very different question would have arisen. The Plaintiff's complaint would then have been (if they complained at all), that he did not collect the money and satisfy the judgment, or that he did not use due diligence therein.

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What, then, is the supposed legal excuse or justification of the Defendant's delay and retention of the money from the 5th day of August, 1858, to Nov. 29th, 1859?

1st. The pendency of motions to discharge the attachments against the property of the judgment-debtor; and 2d, the stay of the Defendant's proceedings pending those motions, or some of them.

Obviously, the mere pendency of motions to discharge an attachment against the property of a judgment-debtor has no effect upon the duty of the Sheriff to levy and collect the execution issued on the recovery of judgment in the action. Whether the attachment was properly issued or not, it was the duty of the Sheriff to levy the execution, and collect it if possible; and even if it proved that the attachment was erroneously or improvidently issued, and it was for that reason discharged, nevertheless, if the execution, when issued, was collected out of the property of the debtor, it was the duty of the Sheriff to pay over the money. The pendency of a motion to discharge the attachment was a matter wholly immaterial to any question affecting the duty of the Sheriff to collect the execution and satisfy the judgment. On the other hand, if the property attached, and then kept within reach of the execution, was not the property of the judgment-debtor, or was claimed by third persons, or for any reason ought not to be subjected to levy, the Sheriff might be justified in returning the execution nulla bona; or, if pending the motion to dissolve the attachment, the Court had seen fit to stay the proceedings, or retain the money in the hands of the Sheriff, after he had collected the amount out of the property attached, the Sheriff could not have been required to pay interest thereon as damages for not paying over, or otherwise.

No doubt, when the Sheriff has first levied an attachment, and thereby obtained the custody of property or money alleged to belong to the debtor, and judgment is thereafter recovered, and execution issued, it would be a protection to the Sheriff, so far as the attached property alone furnished him the means of satisfying the execution, that the property was neither liable

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to attachment nor levy on the execution. And in a case of doubt the Court has full power to stay the proceedings of the Plaintiff, pending any motion or other proper inquiry.

2d. There was here no stay of proceedings from the recovery of judgment until the 25th of June, 1859, and then only from the 25th of June until the 9th of November, 1859.

The charge of the Judge at the trial appears to be in conformity with these views. He instructed the jury that the Defendant was chargeable, to the extent of interest, from the date of the judgment, from which date the Sheriff had (or certainly ought to have) collected the interest, until the time when he paid the amount of the principal to the Plaintiff's attorney, on account of the execution, deducting, however, from such period, the time during which "the Defendant was legally stayed from paying the money, viz., from June 26 to November 9, 1859."

This was quite as favorable to the Defendant as he could legally claim. It overlooked the fact, that if he had paid over the money, as he should have done, when he collected it, the Plaintiffs would have had the use of the money during this interval of stay, and that there was plausibility, at least, in the claim that the Defendant, by his neglect of duty, had deprived the Plaintiffs thereof, and by the delay had subjected it to the operation of such an order.

There was therefore no error in the principles governing the trial of the action, in respect to the liability of the Defendant.

But there is an exception to the charge of the Judge, in regard to the amount which the Plaintiffs were entitled to recover, which seems to me well taken.

The Defendant proved, and it is so expressly conceded in the case, that in pursuance of an order requiring him so to do, he had, since the return of the execution, paid to the Plaintiffs ninety dollars for interest received by the Sheriff on the money collected, and also paid the Plaintiffs interest on such ninety dollars from the 29th of November, when the execution was returned.

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Now, the Sheriff was entitled to be credited with these payments, and yet the Judge instructed the jury, peremptorily, that the Plaintiff was entitled to recover interest on the judgment-debt of $8,753.36, from the rendition of the judgment, 5th of August, 1858, to the return of the execution, Nov. 29, 1859, deducting from such period the time when payment of the money was stayed—i. e., from June 26 to Nov. 9, 1859, and interest upon such interest from the said 29th Nov. to the date of the verdict, which was Nov. 26, 1861.

This was error. The Plaintiff had received from the Sheriff $90, and interest thereon, for interest on the judgment debt, on proof that the Sheriff had himself collected such interest.

They were not entitled to recover the same interest again, as damages for the delay or neglect of the Sheriff to pay over the principal debt and interest thereon, when it should have been paid; yet such was the effect of this peremptory instruction.

A correct computation, according to the rule prescribed in the charge, making allowance for this error, shows that the sum which the jury were instructed to find exceeded the true amount; and if the Respondents see fit to abate from their recovery, and so avoid the delay and expense of a new trial, it is just that the error should be rectified.

Then the period for which interest was to be allowed, was from August, 5, 1858, to Nov. 29, 1859—1 y. 3 mos. 24 days —less the period of the stay of proceedings, from June 26 to Nov. 9, 1859—4 mos. 14 days—viz., 11 mos. 10 days.

Interest for that period on $8,753.36 is.....	$578 69
Crediting thereon the sum collected.....	90 00
	$488 69
And allowing interest on the balance from Nov. 29, 1859, to the time of the verdict, Nov. 26, 1861	68 13
The amount is.....	$556 82

Upon filing their consent to reduce the verdict to that sum,

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and abate from the judgment accordingly, the Respondents should have judgment of affirmance for the reduced amount, without costs on this appeal.

If no such consent be filed, the judgment should be reversed, and a new trial ordered, with costs to abide the event.

Affirmed, conditionally. JOEL TIFFANY,
State Reporter.

CHARLOTTE M. PATCHIN, EXECUTRIX, RESPONDENT, *v.* JOHN M. PECK, APPELLANT.

Pleading—Complaint—Defect of Parties—Demurrer—Power of Referee to Amend.

W. A. Beach for Respondent.

J. H. Reynolds for Appellant.

GROVER, J.—The common law has been changed by the Code, as to the mode of securing any advantage that may be derived from a defect of parties Plaintiffs or Defendants.

By the latter, where the defect appears upon the face of the complaint, the objection can only be raised by demurrer to the complaint, and if the defect does not so appear, by answer, and unless the objection is so taken it is deemed to have been waived (Code, §§ 144, 146, 147 and 148).

This has been repeatedly so held by this Court in reported cases.

This shows that the Defendant could not give in evidence the interest of Whitman, as partner with the Plaintiff, in the demand for services rendered in the Slocum suit, in bar of a recovery of that demand.

It is suggested by the counsel for the Defendant, that the

Misjoinder of parties—Demurrer—Waiver. 79 *Hun,* 540 (61 *St. Rep.* 555; 29 *N. Y. Supp.* 936); 66 *Barb.* 359; 41 *St. Rep.* 469 (17 *N. Y. Supp.* 455); 44 *St. Rep.* 294 (17 *N. Y. Supp.* 591).

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rule ought not to be applied in this case, for the reason that the Defendant could not determine from the complaint that this demand would be claimed by the Plaintiff in this action.

If this be so, the remedy of the Defendant was either to apply to have the complaint made more specific, or to obtain a bill of the particulars of the Plaintiff's demand.

The question remains whether the evidence was admissible to resrict the recovery to the amount of the Plaintiff's interest in the demand?

The interest of the Plaintiff was that of a partner, and extended to the entire demand.

Payment of the whole to him would have discharged the Defendant as to both partners.

A recovery of the whole in this action by the Plaintiff will have the like effect. Under such a state of facts it was held by this Court, that when the action was in tort by one party jointly interested with another in the subject-matter, a recovery might be had for the entire demand (Zabriskie *v.* Smith, 13 N. Y. 322).

No reason is perceived why the same rule should not be applied to actions upon contract under the Code. It was also insisted that the Plaintiff could not recover upon the notes given to him as receiver, nor for the money loaned to the Defendant, when the checks therefor where drawn by the Plaintiff, as receiver, to be charged by the bank to the Plaintiff in the account kept of moneys held by him in that capacity.

It is true that the money held by the Plaintiff, as receiver of the bank, were trust funds.

These funds the Plaintiff had no right to loan. The money could be recovered of any one who had received it of the Plaintiff, with knowledge of its trust character, by a successor of the Plaintiff, as receiver.

But the Defendant, who borrowed it of the Plaintiff, and agreed to repay it to him, cannot defend himself against an action by the Plaintiff upon such contract, by simply showing the trust character of the money.

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He must go further, and show that payment to the Plaintiff, in pursuance of his contract, will still leave him liable to respond to some other party for the same money.

While the Plaintiff continued receiver, payment to him of the money borrowed would have been good, not only as against the Plaintiff, but also against any successor of the Plaintiff in the receivership.

The same effect would follow upon payment of a judgment recovered by the Plaintiff therefor. Hence, the evidence that the loans were made by the Plaintiff in his individual capacity, and that the Defendant agreed to pay in that capacity, was competent.

No steps having been taken to remove the Plaintiff, or to make the Defendant responsible to any other person for the sums borrowed, the Defendant cannot protect himself from payment to the Plaintiff by showing that he held the money as trustee, and therefore had no power to loan it.

These remarks apply to the sums loaned upon the checks of the Plaintiff, as receiver.

As to the notes made payable to the order of the Plaintiff, as receiver, they were endorsed by him as such, and thus a valid apparent title given to the holder. This title was not impeached upon the trial.

I have examined the exceptions taken upon the trial to the rulings of the referee, as to the admissibility of testimony, and think none of them well taken.

The exception to the refusal of the referee to permit an amendment of the answer, setting up the interest of Whitman, is not well taken.

It is true that the referee says he had no power to grant the amendment. In this I think he erred.

By section 272 of the Code, the referee had the same power of amendment upon trial as the Court in like case.

The proposed amedment was within this power.

But it does not appear that the amendment would have been granted, had the referee held he possessed the power.

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The denial is not therefore shown to have been erroneous.

The referee found the facts found by him from the evidence, and appears to have been very liberal toward the Plaintiff.

Nevertheless, there being no legal error in the case, the judgment must be affirmed.

The judgment was affirmed, but not upon the grounds stated in this opinion.

JOEL TIFFANY,
State Reporter.

MARY JANE BLOSSOM *v.* JOSEPH *C.* BURRITT AND WILLIAM L. HALL, ADMINISTRATORS OF WM. L. HALL.

Evidence—Judgment Record—Effect of Untenable objection—Void Marriage—Joinder of Causes of Action—Election.

Where, on the trial of an action, the record of a prior judgment is offered in evidence, and is objected to only upon frivolous or untenable grounds, all valid objections to its admissibility are thereby waived.

When a rendering of a decree of divorce is introduced in evidence, to establish the fact that the Defendant had been divorced from a wife of a former marriage, it is evidence only of such fact and of the cause for which it was granted.

In an action by the Plaintiff against Defendant for fraudulently inducing Plaintiff to marry Defendant, when Defendant was not competent to enter into the marriage contract with Plaintiff, by reason that the wife of a former marriage with the Defendant had been divorced from him by reason of his adultery, and was still living, it was held, that the second marriage being absolutely void, the Plaintiff might maintain her action against the Defendant.

Where the Plaintiff had brought her action for such fraud, and also for an assault and battery, held, that she was not required to elect upon which

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Pleading—Separate causes—Numbering—Waiver. 15 *Hun,* 47, 51; 53 *St. Rep.* 369 (23 *N. Y. Supp.* 577).

Causes of action—Joinder—Election. 40 *How. Pr.* 179 (9 *Abb. N. S.* 305; 2 *Sweeny,* 338).

Fraudulent marriage—Ill treatment—Damages. 62 *How. Pr.* 89.

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she would proceed, as the assault and battery might be proved in aggravation of damage, etc.

MASON, J.—This action was brought to recover damages of the Defendant for fraudulently inducing the Plaintiff to marry the Defendant, and to cohabit with him—he having another wife living, from whom he was not lawfully divorced, and the Defendant being at the time incapacitated to marry any one while his prior wife was living. The case was tried at the Schuyler Circuit, and the Plaintiff recovered a verdict of $9,000. There was also a count in the complaint for assault and battery. The case was abundantly proved upon the evidence.

There is no pretence but that the Defendant was married to Cornelia Anderson some twenty years ago, and that she procured a divorce from him for his adultery, and which decree prohibited him from marryng again during the lifetime of the said Cornelia. It was proved upon the trial, by parol evidence, without objection, that the Defendant was married to one Harriet Randall, also, before his marriage to the Plaintiff, and that she also had procured a divorce from him, upon the ground that such marriage was illegal and void—the said Defendant being incapacitated to contract marriage while his former wife was living. When the record of this second decree of divorce was offered in evidence, the Defendant objected to it, on the ground that it was already proved by parol, and that the fact attempted to be proved was not denied in the pleading.

Neither of these objections is tenable, and no detriment could result to the Defendant from his evidence, as his answer fully admits this decree of divorce. If there was a valid objection to this decree the Defendant waived it by taking untenable grounds of objection (Dunham *v.* Simmons, 3 Hill R. 609). At the close of the trial the Plaintiff's counsel commenced to read the complaint in that action of divorce, in which the said Harriet Randall was Plaintiff, and he did read a portion of such record, which was objected to, and the Court held that the whole record in that suit was in evidence, but that such

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record only established the fact that a divorce had been granted in the case, and the cause for granting it, to which Defendant's counsel excepted. I am not able to see any error in this ruling. The record had been put in evidence, as we have already seen, without any legal objection raised against it. The Defendant cannot now raise objections to this record in this Court for the first time. If these objections had been raised upon the trial, the Plaintiff might have been able to obviate them by proof; and besides, it furnishes no ground for a new trial, as the Defendant, in his answer, fully admits this decree of divorce.

The Defendant moved to nonsuit the Plaintiff, on the ground that the relation of husband and wife not being dissolved, this action for damages cannot be maintained; and also upon the ground that the evidence shows that there was such gross negligence on the part of the Plaintiff in entering into this marriage relation with the Defendant, that the law will not afford her any remedy in the case; which motion was denied, and the Defendant excepted.

The statute declares this marriage with the Plaintiff absolutely void (2 R. S. 139, § 4); and there is no objection to the Plaintiff maintaining this action because of the marriage relation entered into between them. The Plaintiff had a right to rely on the position and repeated statements of the Defendant —that he was lawfully divorced from his former wife—and was not required to investigate the records of the city of New York, three hundred miles away (Mead v. Bunn, 32 N. Y. R. 275).

At the close of the trial the Defendant insisted that the Plaintiff was bound to elect whether to go for the damages upon the fraud in the contract, or the assault and battery; that both cannot be joined in one action. The Court held that the action was maintainable, if the fraud was established. That if the fraud was established:, and the Defendant had ill-treated the Plaintiff, that was matter in aggravation of the damages, and that the Plaintiff was not bound to elect; and to this ruling the Defendant excepted.

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The misjoinder of causes of action, if any there be in this case, appears upon the face of the complaint; and as the Defendant has not demurred to the complaint, he has waived the objection, and cannot raise it upon the trial, as the Court had jurisdiction, and the complaint stated facts sufficient to constitute a cause of action (Code, §§ 144, 147, 148). The Judge at Circuit properly overruled the Defendant's application to compel the Plaintiff to elect for which cause of action she claims to recover; and it is not important to inquire whether he assigned a wrong reason for his ruling or not. As the case stood upon the pleadings, the Plaintiff had a right to insist upon a recovery upon both, and the Judge should so have charged the jury. The Plaintiff was probably more prejudiced by this ruling, in allowing the jury to take into consideration the ill-treatment proved upon the trial in aggravation of the damages for the main cause of action only, than was the Defendant.

I am inclined to think, however, that it was legitimate for the jury to consider this ill-treatment in connection with the fraudulent marriage, cohabitation, and the personal control which that relation gave the Defendant over the Plaintiff—she innocently believing that the Defendant was her lawful husband.

It is manifest from the rulings of the Judge upon the trial, and his charge to the jury, that the Plaintiff was not permitted to recover damages for the independent cause of action for assault and battery, and consequently no injury can have resulted to the Defendant in consequence of the Judge's submitting this question in the form he did to the jury.

The objection taken by the Defendant to the evidence given by the Plaintiff and her witnesses, to prove that the Defendant assaulted and beat her, were properly overruled for the same reason. She was entitled, under the pleadings, to give the evidence, and to make it the basis of a claim for damages before the jury.

There were many objections taken to the admission of evi-

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dence offered by the Plaintiff upon the trial, the rulings upon which are complained of here.

The most of these are frivolous.

We will consider some of the most important. The question put by the Defendant's counsel to Mrs. Howell, was properly excluded. It was at any rate discretionary with the Court whether to permit it or not (32 N. Y. R. 127).

All of the evidence offered to contradict Mrs. Howell, by showing that she had made statements different from what she testified on her cross-examination by the Defendant's counsel, was properly excluded, as all the matters inquired of were collateral to the issue in the cause, and the Defendant must take her answers.

The question put to the Defendant, on his cross-examination, to wit: "Did you tell Harriet Randall that you were worth $70,000?" was properly allowed as legitimate cross-examination. The Defendant had testified, on his direct examination, that he was worth only about $17,000, and it was competent for the Plaintiff, on cross-examination, to show that this was not so, and that he was really worth a good deal more.

It was pertinent cross-examination upon the very subject on which the Defendant had been examined in his own behalf. The Plaintiff had given evidence by witnesses before, tending to show that the Defendant was worth much more than this. It is proper to say that this evidence was given without objection, and the Defendant was examined to overthrow it; and it was certainly competent for the Plaintiff, on cross-examination, to shake his evidence if he could. As the Defendant denied that he ever told Harriet Randall that he was worth $70,000, no error was committed in allowing the Plaintiff to prove by her that he did tell her so. It would not alter the case if it were conceded that the whole evidence in regard to the Defendant's property was immaterial. When the party voluntarily accepts an immaterial issue, and gives evidence upon it, it does not lie with him afterward to complain that the Court

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allowed the other side to answer him (Young *v.* Mason, 8 Pick. R. 551; Riggs *v.* Lindsay, 7 Cranch R. 500; Grannis *v.* Branden, 5 Day R. 260; Grafton Bank *v.* Woodward, 5 N. H. R. 301).

The objection to this evidence, that it was not admissible because the Defendant's attention was not called to time and place, cannot prevail.

The rule insisted on does not apply when the admission sought to be proved is that of a party to the suit. The party's confessions are competent, without interrogating him at all in regard to it. The further objection that this evidence was not admissible because it was made to her while they were husband and wife, cannot be sustained.

The statute itself declared their marriage void; and besides, the Supreme Court had already declared it so. The Defendant therefore could not claim any protection as to communications made to her (Wells *v.* Fletcher, 5 Carr. & Payne, 12; 1 Moody & Rob. 99; 2 Dev. & Bat. 177; 2 Cow. & Hill's Notes, 1544).

I do not think that any error was committed in allowing Mrs. Van Duzer, Mrs. Sprowls, and Mrs. Clark, to give the evidence which they did, tending to contradict Mrs. Borum. She did not answer the questions put to her. She certainly equivocated and qualified her answers—qualified some, and actually gave such a coloring to others that it can hardly be claimed she assented to the contradictions which those witnesses proved; and I cannot think that any violence was done to the rules requiring the party to call the attention of the witness to time and place, where he wishes to lay the foundation for contradicting; for Mrs. Borum was very particularly inquired of as to these conversations, and she recollected some of the conversations, and the places where they were had, and wherever this particular objection was made, the case shows she understood perfectly the place and time.

I am satisfied that substantial justice was done upon the trial, and I advise the affirmance of the judgment.

Affirmed.

JOEL TIFFANY,
State Reporter.

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JOHN BINSSE, EXECUTOR, AND LOUISA LA FARGE, EXECUTRIX, &C., OF JOHN LA FARGE, DECEASED, *v.* WILLIAM L. WOOD.

Lease—Surety—Arbitration—Substitution of Arbitrator by Principal—Liability of Surety.

Where a principal debtor has, according to the terms of his original contract, submitted a matter in controversy to the determination of arbitrators, and they have awarded upon the same, his surety on said contract is liable upon said award, although he was not a party to the arbitration, and had no notice of the same.

When the covenant of the surety is one of general indemnity, he is concluded by the judgment against his principal touching such subject-matter, unless he can, on being let in, show that his principal had a good defence to the claim, etc.

ON the 27th of January, 1853, John La Farge and Charles

Trial—Motion for nonsuit—Statement of grounds. 40 *N. Y.* 585; 41 *N. Y.* 227; 49 *N. Y.* 585; 122 *N. Y.* 662 (34 *St. Rep.* 241; 3 *Silvr. Ct. App.* 136); 141 *N. Y.* 165 (56 *N. Y. Supp.* 684); 141 *N. Y.* 520 (57 *St. Rep.* 719); 10 *Hun,* 445; 2 *T & C.* 379; 58 *Barb.* 497; 20 *Abb. N. C.* 316 (9 *St. Rep.* 523); 18 *St. Rep.* 718 (2 *N. Y. Supp.* 650); 33 *St. Rep.* 425 (11 *N. Y. Supp.* 738); 20 *Misc.* 554 (46 *N. Y. Supp.* 433); 29 *Misc.* 143 (60 *N. Y. Supp.* 283); 37 *Misc.* 384 (75 *N. Y. Supp.* 774).

Trial—Defect in proofs—First raising on appeal. 39 *N. Y.* 50; 75 *N. Y.* 342; 94 *N. Y.* 41; 148 *N. Y.* 135; 160 *N. Y.* 199; 183 *N. Y.* 346; 40 *Hun,* 338; 3 *T. & C.* 13; 51 *Super. Ct.* 502; 15 *Daly,* 188 (4 *N. Y. Supp.* 708); 19 *St. Rep.* 844 (3 *N. Y. Supp.* 60); 46 *St. Rep.* 857 (18 *N. Y. Supp.* 782); 16 *Misc.* 381 (74 *St. Rep.* 312; 38 *N. Y. Supp.* 58).

Judgment against principal—Effect of, as evidence against surety. 4 *Hun,* 783, 35 *Hun,* 511; 63 *Hun,* 416 (44 *St. Rep.* 710; 18 *N. Y. Supp.* 685).

Distinguished—Surety—Change of contract—Liability. 46 *N. Y.* 99.

Notice—Preliminary to action—Effect of omission. 96 *N. Y.* 556.

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Wright entered into an agreement in writing and under seal, by which La Farge demised to Wright the premises then built up and known as Metropolitan Hall, and the premises adjoining, fronting on Broadway, in the city of New York (on which La Farge was then erecting a hotel), for the period of ten years, from May 1, 1853, at the annual rent of $48,000, payable in equal monthly payments of $4,000 each, "on the first day of every month, after the rent should commence, as thereinafter provided." And it was agreed that "the rent should commence as soon as the said hotel should be finished and fit for occupancy, and as thereinafter provided, and Wright should then take possession." La Farge agreed that the hotel should be built according to certain plans and specifications. By the sixth article it was provided that "Philip Burrowes and Charles E. Appleby, or, in case of their disagreement, an umpire, to be selected by them, shall determine when the payment of the rent shall commence, according to the provisions of this indenture." And by the sixteenth it is provided as follows: "In case the said Philip Burrowes shall become unable or refuse to act in discharge of the powers herein conferred upon him, it shall be the duty of the said Wright to appoint some person to be the successor of said Burrowes. And in case the said Charles E. Appleby shall become unable, or refuse to act in discharge of the duties herein conferred upon him, it shall be the duty of the said La Farge to appoint some person to be the successor of said Appleby; and such successors of the said Burrowes and of the said Appleby, respectively, shall be vested with all the rights and powers hereby conferred upon them." In case of total destruction by fire, the lease was to terminate. Annexed to the lease was an agreement bearing the same date (January 27, 1853), and executed under the hand and seal of the Defendant, in these words: "I, William L. Wood, of Hartford, Connecticut, in consideration of the execution of the foregoing lease by John La Farge, and of the sum of one dollar to me in hand paid by him, do hereby covenant and agree with him that Charles Wright, named in the said lease, shall well and truly pay the rent thereby agreed to be paid, during the period of one

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year from and after the time the rent shall commence, according to the condition of said lease; and in case of the failure of said Wright to make such payment, I covenant and agree, to and with the said La Farge, that I will pay the same to the extent of $10,000, less one-fifth of what said Wright may have previously paid on account of such rent. Nothing herein contained shall be regarded as an assumption of liability on my part, beyond that sum."

On the 8th of January, 1854, the buildings on the demised premises were destroyed by fire, and, being burned to the ground, became wholly untentable, which terminated the lease.

Up to the time of the fire, it had not been determined when the rent should commence. Philip Burrowes did not act. It was proved that he went to Europe on the 5th of January, 1855, as an absconding debtor, and had not returned at the time of the trial.

On the 22d of February, 1855, Wright, the lessee, by an instrument in writing, executed under his hand and seal, in accordance with the terms of the sixteenth clause of the lease, appointed one Peter D. Loucks to be the substitute or successor of Burrowes, and Loucks, by an endorsement in writing, consented to act, pursuant to the appointment.

On the 2d of December, 1856, Appleby and Loucks notified La Farge and Wright, the landlord and tenant, in writing, of the time and place when they would hear the parties in reference to the time when the rent commenced.

At the time and place appointed they met and were sworn, and, after hearing the parties, signed a written decision in these words: "At the time and place appointed in the foregoing notice, the undersigned met and proceeded to investigate the question as to the time when the payment of the rent should commence, according to the provisions of the lease referred to in the said notice; and having been attended by the parties, and having heard all the proofs and allegations which they or either of them had to offer in reference to the said question, and the said question having been fully submitted to us for decision, we do hereby decide and determine that the said rent

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should commence on the 15th day of November, 1853, and that the said rent did begin to accrue on that date."

The cause was tried at a Circuit Court on the 23d of November, 1864.

On the trial the facts appeared as above stated. The Defendant's counsel objected to the introduction of the evidence of the substitution of Loucks, his consent to act, the notice of hearing, and the decision, upon the ground that it had not appeared that Philip Burrowes, named in the lease, had become unable or refused to act, nor that due diligence to charge Defendant as surety had been used by Plaintiffs, nor that notice had been given to Defendant of any intention to make such appointment, or of its having been made. These objections were overruled by the Court, and the Defendant's counsel excepted. He also moved to dismiss the complaint, without assigning any grounds, which motion was denied, and he excepted.

The Court then directed the jury to find a verdict for the Plaintiffs, to which the Defendant's counsel excepted.

Under the instruction of the Court, the jury rendered a verdict in favor of the Plaintiffs for the sum of $12,245.55, being the amount claimed (viz., $6,969.83, for fifty-three days' rent, from November 15, 1853, to the time of the fire on January 8, 1854, at the rate of $48,000 per annum), with interest from the 8th day of January, 1854.

The Court directed the exceptions of the Defendant to be heard, in the first instance, at the General Term, and stayed judgment on the verdict in the meantime.

The General Term granted a new trial, unless the Plaintiffs consented to reduce the recovery by casting interest on the amount of rent due, only from the date of the decision of Loucks and Appleby, on the 23d day of January, 1857, instead of from the day of the fire (8th January, 1854), as found by the verdict.

This the Plaintiffs consented to do, and the judgment was entered in accordance with such reduction. From that judgment the Defendant appeals to this Court.

Albert Mathews for Appellant.

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Samuel Hand for Respondents.

HUNT, CH.J.—If the parties to this action were La Farge and Wright, scarcely a question could be raised. They made a lease and contract, by which it was agreed that certain buildings should be finished and fittted up by La Farge; that the same should be taken by Wright for a designated period, at a stipulated rent; and that the time when the rent should commence to run should be fixed by the mutual award of Philip Burrowes and Charles E. Appleby, and the intervention of an umpire, if needed. They further agreed upon a mode of obtaining a new arbitrator, in case either of those named should refuse or become unable to act. At a subsequent period, they deemed Burrowes unable to act, appointed or agreed to the appointment of Mr. Loucks in his stead, produced their witnesses and made their proofs before the two arbitrators thus appointed, and an award was made fixing the time when the rent should begin to run. The time of the commencement of the rent being thus fixed, the rent per month being specifically agreed upon , and the termination of the lease, by the burning of the building on the 8th of January, 1854, being assented to by both parties, the amount due was a matter of figures merely. This suit, however, is against Mr. Wood, not the original lessee, but a surety for the payment of a certain amount of the rent by Wright, during the first year. It is insisted that his position presents different questions.

It is argued that, by the terms of the lease, the rent was not to commence until the hotel was finished fit for occupancy, and that that event has never occurred; also that the Defendant could not be made liable for rent, by any determination of the arbitrators, until the landlord had first put the tenant in possession, and this event, it is said, has never occurred. The Defendant further insists that, although Wright may be concluded by the award, by reason of his appearance and participation in the proceedings before the arbitrators, that he, being a surety, and having taken no such part, and having no notice thereof, is not bound by them.

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I apprehend that the Defendant is in error in these positions, and that he occupies the same ground, and no other, as that occupied by Wright himself. This is one of those cases so clearly defined by Smith, J., in Bridgeport Insurance Company *v.* Wilson (34 N. Y. R. 275), where the Defendant makes his liability to depend upon the result of a litigation between other parties. See also Lee *v.* Clark (1 Hill, 56; Rapelye *v.* Prince 4 Hill, 119; Aberdeen *v.* Blackmar, 6 Hill, 324). The rule is thus laid down: "Covenants to indemnify against the consequences of a suit are of two classes: 1. Where the covenantor expressly makes his liability depend on the event of a litigation to which he is not a party, and stipulates to abide the result; and 2, where the covenant is one of general indemnity merely. In cases of the first class, the judgment is conclusive evidence against the indemnitor, although he was not a party, and had no notice, for its recovery is the event against which he covenanted. In those of the second class the rule already stated applies, to wit, that the want of notice does not go to the cause of action, but the judgment is primâ facie evidence only against the indemnitor, and he may be let in to show that the principal had a good defence to the claim." The result of the litigation to which the present Defendant committed himself is binding upon him, without notice, leaving him, however, at liberty to show fraud, collusion, and perhaps that there was a good defence which the party neglected to interpose. The judgment—a decision—is evidence against him, and, until attacked by one of these modes, is conclusive. It would scarcely be argued that Wright could insist that he had never had possession, or that the buildings had never been finished, and that therefore the award did not bind him. The authorities cited show that Wood is equally bound by this decision with Wright, subject to the qualifications stated.

The Defendant Wood expressly stipulated that Wright should pay the rent "during the period of one year from and after the time the rent shall commence, according to the condition of said lease." That condition provided that the commencement of such rent should be ascertained by the award of

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referees, selected and to be selected by La Farge and Wright, and in no other mode. The Defendant therefore agreed that the commencement of the rent should be fixed by the referees then to be chosen. Their decision settles that period, as to him, as well as to Wright.

The other and preliminary questions are no more open in the one case than in the other. The instruments and proceedings by which the time was fixed were necessarily given as evidence. In no other manner could the liability be fixed. They were binding upon the Defendant, subject to his right of attack, as I have before explained (Story on Agency, §§ 58, 59, 60, 70, 85). The same principle furnishes the answer to the allegation of error, in the substitution of Loucks as a referee in place of Burrowes. The doctrine which binds the Defendant to the result of the litigation between LaFarge and Wright also binds him as to the means by which that result was effected (Story's Ag., sup.).

The power to determine the question of inability or refusal was extended by the Defendant to Wright, as was the production of evidence, and other proceedings on the hearing before the referees. As an original question, too, I see no difficulty on this point. At the time the question was to be investigated by the referees, Burrowes was absent from the United States—had left the country a year previously, and as an absconding debtor. This presented a case of inability to act.

The Defendant further insists that there was error in the refusal of the Court to dismiss the complaint, at the close of the evidence. The record is this: "The Plaintiff then rested his case. The counsel for the Defendant then moved to dismiss the complaint. The Court overruled the motion, and the Defendant excepted." The Defendant now insists that it was not proved that the hotel was completed,or that Wright had entered into possession, and that this proof was essential to the right of recovery. An answer has already been made to this suggestion. It would be sufficient also to say that a motion for a nonsuit, or a motion to dismiss the complaint, to be effectual, must specify the defects supposed to exist. It is not sufficient to

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make a general objection. In the present case, the proofs which it is said are not presented might have been supplied without difficulty, and the objection thus obviated. We have repeatedly held that this is not sufficient (see Shotwell *v.* Mali, 38 Barb. 445—affd. 36 N. Y. 200, sub-nom. Bruff *v.* Mali).

It is said that the judgment was erroneously entered for a larger amount than was authorized by the General Term. This is not the subject of an appeal to this Court, but should have been corrected by motion made in the Court below. Judgment should be affirmed, with costs.

WOODRUFF, J. (dissenting)—A surety is entitled to have the parties held to a strict observance of all the conditions of his liability.

These conditions are not to be construed to his prejudice, beyond their plain and ordinary signification.

The consent of his principal to any departure from the terms of the engagement, for the performance of which the surety is bound, does not bind the surety.

The maxim, "In hoc fæderi non veni," may always be invoked by the surety, and he is entitled to its protection.

By the terms of the lease stipulating the rent (payment of which was guaranteed by the Defendant), Philip Burrowes and Charles E. Appleby were to determine when it should commence.

No warrant was given to appoint any other person to determine that period, unless they, or one of them, were unable or refused to act.

There is some reason for saying that the rent would not commence until it had been so fixed. But it is sufficient for this case to say, that there was an utter failure to show that Burrowes either refused or was unable to act in the matter.

He was here for a year after the buildings had burned, and thirteen and a half months after the day when, it is claimed, the tenant began to occupy so as to be chargeable with rent.

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He was not, so far as appears, applied to by the Plaintiffs' testator to act in the matter.

And, if it were conceded that his departure for Europe, at the end of thirteen and a half months, would then constitute inability to act, it would not prove inability or refusal within the reasonable construction of the lease.

If the lessor be not held bound to cause the time to be fixed *before* the rent can be said to begin to accrue, he was bound to do so within a reasonable time thereafter. And if he chose to wait more than a year without taking any step for the purpose, he did so at his own peril, so far as the surety was concerned.

Two things were important to the surety, the advantage of which he lost by the delay. First, that the rent should be paid *monthly,* according to the stipulation of the tenant contained in the lease. Second, that the time when it should commence should be fixed by Mr. Burrowes (in conference with Mr. Appleby); and it is to be assumed that he had special confidence in the judgment of Mr. Burrowes in that regard.

As to the first, the designation of the time when rent should begin was not fixed until January 23, 1857—more than two years after the building was burned and the lease terminated. And meantime the surety had no notice of any default of his principal; and what is more important, there was not, in that whole interval of two years and two months, a moment when the surety could have paid the debt and called upon his principal to reimburse him; and when the matter was finally submitted to Appleby, and the person substituted by the tenant in the place of Burrowes, the question was simply and only, how much is due to the lessor for an occupation which, if it ever began, had ceased two years before?

This was not according to the fair meaning and intent of the contract.

Nor is it any answer to this point to say that it was the duty of the tenant to bring on the meeting of the referees or arbitrators. It was equally in the power of the lessor, and if he wished to avail himself of the stipulations dependent thereon, he should have acted.

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If he had called upon Burrowes and Appleby, and they had neglected, and, by delay, practically refused to act—or if Burrowes had done so, and the tenant (Wright) had neglected or refused to appoint another, a very different question would have arisen.

And as to the second, he was entitled, at least, to have the period of commencement fixed within a reasonable time, so that he might not lose the judgment and opinion of the person selected and approved by himself.

If it was competent for the lessor to delay one year, Burrowes being here and willing to act, I see no reason why he might not wait five years, and take the chance of Burrowes' death or other event that might deprive the Defendant of his services, and then induce the tenant to select another.

The assent of the tenant cannot affect the surety, if his conduct was not according to the just construction of the lease, and I think that it was not.

It is suggested that the exception taken by the Appellant on the trial does not cover this point, because it was general to the instruction of the Court to find for the Plaintiff, *without* any request to submit any question to the jury.

There was no dispute about the facts—no conflict of evidence—and therefore there was no question to be submitted or which the Appellant could, with propriety, ask to be submitted.

It was a mere question of law upon facts not controverted, or, at least, not left in doubt by any conflict of evidence, whether the Plaintiff was entitled to recover; and to the decision of that question a proper exception was taken.

Besides, the answer of the Defendant had denied that Burrowes was unable or refused to act; and denied that the tenant had any power to appoint a substitute, or that the determination of Appleby and such substitute was binding upon him.

And thereupon, when the appointment of the substitute was offered in evidence, he objected to it as evidence against him, on the ground that it did not appear that Burrowes had become unable or refused to act, or that the Plaintiff had used due diligence to charge him as surety.

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And the like objection was made to the decision or award made by Appleby and the substitute for Burrowes.

These exceptions were sufficient to raise the question, whether such substitute was duly appointed to fill the place of Burrowes.

In my opinion the judgment should be reversed, and a new trial ordered.

All affirm, except WOODRUFF, J., dissenting, and MASON, J., not voting.

Affirmed.

JOEL TIFFANY,
State Reporter.

WM. F. RUSSELL AND OTHERS, ADMINISTRATORS, &C., OF JEREMIAH RUSSELL, DECEASED, *v.* DAVIS WINNE, APPELLANT.

Chattel Mortgage—Fraudulent Agreement—Sales by Mortgagor.

An agreement between mortgagor and mortgagee that the former may

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Mortgage—Fraud—Validity—Question of fact. 165 *N. Y.* 90; 34 *Misc.* 246 (69 *N. Y. Supp.* 626).

Mortgage—Void in part—Effect as to whole. 130 *N. Y.* 601 (42 *St. Rep.* 729); 61 *Hun,* 603, (41 *St. Rep.* 881; 16 *N. Y. Supp.* 452); 20 *App. Div.* 78 (46 *N. Y. Supp.* 739); 25 *App. Div.* 510 (49 *N. Y. Supp.* 859); 9 *Misc.* 681 (62 *St. Rep.* 268; 30 *N. Y. Supp.* 556) 37 *Misc.* 656 (76 *N. Y. Supp.* 136); 39 *Misc.* 263 (79 *N. Y. Supp.* 414); 2 *N. Y. Supp.* 433.

Chattel mortgage—Fraudulent agreement—Sales by mortgagor. 42 *N. Y.* 209; 72 *N. Y.* 432; 99 *N. Y.* 172; 114 *N. Y.* 570 (24 *St. Rep.* 526); 124 *N. Y.* 381 (36 *St. Rep.* 338); 11 *Hun,* 569; 15 *Hun,* 33; 17 *Hun,* 393; 60 *Hun,* 17 (38 *St. Rep.* 632; 14 *N. Y. Supp.* 683); 65 *Barb.* 45; 19 *St. Rep.* 301 (4 *N. Y. Supp.* 433).

Chattel mortgage—Description—Sufficiency. 10 Daly, 202.

Fraudulent conveyance—Severance of valid from void portion. 1 *Hun,* 519 (3 *T. & C.* 650); 73 *Hun,* 351 (55 *St. Rep.* 764; 26 *N. Y. Supp.* 196).

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dispose of the mortgaged property to his own use, renders the mortgage fraudulent as to creditors, whether the agreement be contained in the mortgage or otherwise.

Where the mortgagee of a chattel stipulates that the mortgagor may retain possession of the mortgaged property, he assumes the burden of showing the transaction to be made in good faith, and not to hinder, &c., creditors.

When void as fraudulent in respect to a part of the property, it is wholly void.

THIS action was brought to recover damages of the Defendant for the alleged conversion by him of a quantity of stone. The Plaintiff made title to the stone under a mortgage given to him by one Woodward (who at the time owned the same) to secure the payment of twelve hundred and thirty-one dollars and nineteen cents, then justly owing by the latter to the former, payable on demand, with interest, and described the property mortgaged as follows: "All my flagging, curb, and bridge stones, also all my platform, gutter, and coping stones, and all other stones belonging to me, and all other goods and chattels, and now in my yard, store, and dock at West Camp, and at Eve's Port, and at Saugerties Landing, all in the town of Saugerties."

The mortgage contained a clause providing that the mortgagor should continue in possession and the full and free enjoyment of the property mortgaged, until default made in payment of the sum thereby secured. The mortgage was dated January 27, 1862. The Defendant, who was Sheriff, made title by virtue of three executions issued upon judgments of the Supreme Court against Woodward, in June, 1862, and delivered to the Defendant for collection, who levied the same upon the stone in question, and also upon the goods in the store, and some other property, and sold the same for the purpose of satisfying such executions. It was proved upon the trial that, at the time of giving the mortgage, the mortgagor was engaged in buying and selling stone; that he also kept a store with a small stock of goods, which he sold at retail to such customers as called for them; that he continued, after giving the mortgage, to deal in stone as before; that he sold some of the stone mortgaged, but whether this was known to the mort-

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gagee did not distinctly appear; that he also continued to sell goods from the store in like manner as before; and evidence was given tending to show that this was with the knowledge and assent, and in pursuance of an agreement with the mortgagee, and to apply the proceeds of such sales to his own use, with the like assent and agreement.

It was also proved that, after the levy upon the property by the Defendant, the Plaintiffs' intestate, to induce a postponement of the sale, gave to the Defendant an agreement to the effect that he would be responsible for the property and its production at the time fixed for the sale, and that in the meantime he would not interfere therewith, by virtue of the mortgage in question.

At the close of the evidence the Defendant's counsel moved to nonsuit the Plaintiff, upon the ground, 1st, that he was estopped by the agreement with the Sheriff; 2d, that the mortgage was fraudulent and void, for the reason that the mortgagor was allowed to retain and deal with the property as his own; 3d, that if the mortgage was fraudulent in part, by allowing the mortgagor to sell the goods in the store, it was thereby rendered fraudulent as to all the property covered by it. The motion was denied, and the Defendant's counsel excepted.

The Judge among other things, charged the jury that the mortgage was void as to the goods in the store, as the mortgage contemplated the sale of these goods. The Court further charged the jury that this did not avoid the mortgage as to the residue of the property covered by it. To this latter portion of the charge the Defendant's counsel excepted. The jury found a verdict for the Plaintiff, upon which judgment was entered by order of the General Term of the Supreme Court, before which the exception was ordered to be heard in the first instance, from which the Defendant appealed to this Court.

John H. Reynolds for Respondents.

P. Cantine for Appellant.

GROVER, J.—The agreement given by the Plaintiffs' intestate to the Defendant, upon the postponement of the sale by the latter, was not an estoppel upon the Plaintiff. It merely bound

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the intestate to take care of the property until the day of sale, and produce it at that time, and in the meantime not to interfere therewith by virtue of his mortgage. There was no agreement by the intestate to abandon his claim to the property, or concession of the right of the Sheriff thereto, and of course nothing done by the latter upon the faith of any such agreement or concession. The description of the property contained in the mortgage was sufficient to cover the stone, and also the goods belonging to the mortgagor in the store at the time. That description, after fully pointing out the stone mortgaged, proceeded as follows: "And all other stones belonging to me, and all other goods and chattels now in my store," &c., "all in the town of Saugerties." This embraces all the goods of the mortgagor in the store at the time (Conkling *v.* Shelley, 28th N. Y. 360). This brings us to the question, whether the Judge was correct in his charge to the jury, that the mortgage was void as to the goods in the store, as the mortgage contemplated the sale of those goods by the mortgagor, for his benefit.

This question is only material as affecting the validity of the mortgage as to the stone, as there was no claim made by the Plaintiffs on account of those goods, although sold by the Defendant on the same executions as the stones.

The Judge could not have referred to any clause in the mortgage authorizing a sale of the goods, as the clause in the mortgage giving the right of possession and use of the property to the mortgagor was equally applicable to the stone in question as to the goods.

He evidently referred to the proof showing the constant dealings of the mortgagor in the goods, selling portions thereof, from time to time, as his own, for his own benefit, with the knowledge and assent of the mortgagee—thus evidencing an agreement that the mortgagor might so deal with the goods.

The Judge held that the evidence conclusively proved this, and hence his legal conclusion that the mortgage was void as to the goods, as against creditors. This legal conclusion only need be examined, as the evidence, if not conclusively showing the above facts, tended strongly in that direction, and should

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have been submitted to the jury, had it not been held conclusive by the Court. The question then is, whether an agreement by the mortgagee, made to the mortgagor, that the latter may sell for his own benefit, and as his own, portions of the property covered by the mortgage, renders the mortgage fraudulent and void as to such portions? It would seem that the bare statement of the proposition would be sufficient to warrant an affirmative answer. A creditor for the purpose of securing a debt, has the right to take a mortgage upon chattels from his debtors, and leave the same in possession of the latter, upon assuming upon himself the burden of showing that the transaction was in good faith, and without any intent to hinder, delay, or defraud the creditors of the mortgagor, and by also complying with the other requisites of the statute. If there is an agreement by the mortgagee that the mortgagor may sell or dispose of any of the property for his own benefit, it is established conclusively that the mortgage was given for some purpose other than that of securing a debt to the mortgagee, or of giving him any real interest in such property.

It is evident that, as to such property, the mortgagee not having any real interest therein, such real interest remains in the mortgagor. Why, then, is the mortgage given upon such property? Evidently, the better to enable the mortgagor to enjoy the benefit thereof at the expense of creditors. Were there no creditors of the mortgagor, there would be no object in giving or taking mortgages accompanied with such an agreement. It is, I think, clear that such an agreement shows that the mortgage was not made in good faith, and without a design to hinder, &c., creditors. There is no question of intention to be submitted to a jury. It already appears that as to such property the mortgage was not designed by the parties as an operative instrument between them, and its only operation must be to the prejudice of others. The Court should, as to such property, pronounce it void, for the reason that the evidence conclusively shows it fraudulent. In Edgell *v.* Hart (5 Seld. 213), it was decided by this Court that an agreement contained in the mortgage, authorizing the mortgagor to sell the prop-

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erty for his own benefit, vitiated the mortgage, on the ground of fraud. Surely, the circumstance that the agreement was in the mortgage can make no difference. The effect is precisely the same, whether the agreement is contained in or made separate from the mortgage—whether its existence is proved by writing or otherwise. In all such cases the inquiry is, did it exist? and if so, the same judgment as to its effect should be pronounced. In Wood *v.* Lowry (17 Wend. 492) the same doctrine was applied when the agreement was not contained in the mortgage. This case, although overruled by Smith *v.* Acker (23 Wend. 653) upon another point, has never been as to the point now in question. The same rule was announced by Judge Denio in Gardner *v.* McEwen (19 N. Y. 123), although the point was not passed upon by the Court. So also Griswold *v.* Sheldon (4 Coms. 581); Conkling *v.* Shelley (28 N. Y. 360); Miller *v.* Lockwood (32 N. Y. 293), are not in conflict with, but tend to sustain the rule. It may therefore be regarded as settled, that an agreement between mortgagor and mortgagee that the former may dispose of the mortgaged property to his own use, renders the mortgage fraudulent as to creditors, whether the agreement be contained in the mortgage or not. It would seem to follow, that if such agreement as to the whole property covered by the mortgage avoided the entire mortgage, the same agreement as to a part of the property will avoid it as to that part. The only remaining question is, whether, if the mortgage be fraudulent as to creditors, as to a part of the property mortgaged, it can be upheld as to the residue? As applied to this case, if the mortgage be fraudulent and void as to the goods in the store, is it valid as to the stone? The Judge charged that it was, thus sharply presenting the point. In this and void as to the goods in the store, is it valid as to the stone? The Judge charged that it was, thus sharply presenting the point. In this I think he erred.

The mortgage was one single instrument, given to secure

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one debt. To render it valid it must have been given in good faith, and for the preesnt purpose of securing the debt, and without any intent to hinder or defraud creditors. This cannot be true when the object in part is, or as to part of the property, to defraud creditors. This unlawful design vitiates the entire instrument. The unlawful design of the parties cannot be confined to one particular parcel of the property. Entire honesty and good faith is necessary to render it valid; and whenever it indisputably appears that one object was to defraud creditors to any extent, the entire instrument is, in judgment of law, void. It is not at all analogous to a class of cases where it has been held that a part of an instrument itself, if valid, and not dependent upon other parts which are invalid, may be enforced. Here the fraudulent design, if it existed, destroys the foundation of the entire instrument. The Judge should so have instructed the jury. The judgment appealed from must be reversed, and a new trial ordered, costs to abide event.

WOODRUFF, J.—I think it entirely settled that if a mortgage be one which, by reason of the fraudulent purpose and intent with which it is executed, is declared *void* by statute, it is wholly void, notwithstanding it may include property as to which it would be valid, if it could be regarded as a mortgage of that only. To speak more clearly—if a mortgage be given with the fraudulent intent to cover up and conceal from creditors a portion of the debtor's property, it is altogether void, notwithstanding it also includes land or other property, in relation to which there is a bonâ fide intent to convey it as security for an honest debt and no other purpose and intent. A mortgage void in part as a violation of the statute, is void altogether (Goodrich *v.* Downs, 6 Hill, 439; Grover *v.* Wakeman, 11 Wend. 194; Fulton Bank *v.* Benedict, 1 Hall, 480, 546; Jackson *v.* Packard, 6 Wend. 415; Rice *v.* Welling, 5 Wend. 595; Hammond *v.* Hopping, 13 Wend. 505).

It follows that the instruction of the Judge to the jury, that as to the goods in the store the mortgage was void, involved the further legal consequence that it was altogether void.

If, therefore, the Appellant is entitled on this appeal to in-

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sist upon that instruction as the law of this case, he has a right thereupon to claim that, as matter of law, his motion for a nonsuit should have been granted.

If the instruction had proceeded upon the assumption that the Defendant had shown, by *extrinsic* proof, that, in respect to the goods in the store, they were included in the mortgage with intent to cover them, and hinder and prevent their being taken by creditors, while the stone was in fact mortgaged in pursuance of a demand for security, and with bonâ fide intent that they should be held for that purpose, and no other, then we could not, on exception, examine the facts to see whether that fraud was sufficiently established. But when it appears that the Judge pronounced the instrument void on *its face,* because the mortgage itself "contemplated the sale of the goods in the store," we are at liberty to examine and see whether he gave a correct legal construction to the mortgage, and if not, then, obviously, such instruction, by itself, did not prejudice the Defendant, and we might disregard it and determine the case on the other question raised. So far from this instruction being of prejudice to the Defendant, it was altogether in his favor, because, having told the jury that the mortgage was void as to the goods, he also told them that they might take that fact into consideration in deciding as to the honesty and good faith of the mortgage.

I think, however, that neither the mortgage nor the evidence warranted any such peremptory instruction. A stipulation that, until default, the mortgagor may remain in the full and free possession, and in the full and free enjoyment of the goods, not only is not an authority to sell, but rather excludes such an idea.

No direct proof was given of any express contemporaneous agreement that the mortgagor might sell the goods.

The circumstance that the Plaintiff was at the store once after the mortgage was given, and saw, or most probably saw, sales taking place, was at most a circumstance to be submitted to the jury as evidence of such prior agreement contemporaneous with the execution of the mortgage.

If it was a sale in violation of the rights of the mortgagee,

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or even if it was consented to after the execution of the mortgage, it would not make the mortgage void; it would do no more than discharge the lien on the goods which he consented might be sold.

But I think that the Defendant was entitled to submit to the jury the question, whether it was not, according to the agreement, the intention of the parties that the mortgagor should sell the goods in the store, and appropriate the sales to his own use? And if so, then the instruction requested that if, for this reason, the mortgage was void as to the goods, it was void also as to the other property, should have been given.

The mortgaged property was left in the possession of the mortgagor. He was a storekeeper, and the goods mortgaged embraced all his stock in trade—"all my goods and chattels now in my store." The mortgagor continued his business, selling goods and buying others, without keeping any separate account of sales of mortgaged goods. He did not pay over the proceeds to the mortgagee. The men whom he employed "traded and got goods after the mortgage was given." The Plaintiff, when he took the mortgage, did not visit the premises, or take any means of identifying the goods then in the store, so that he might distinguish them from any others which might be purchased by the mortgagor; nor does anything indicate that he did not suppose that the business of selling and "trading" would go on as theretofore; and on the contrary, when he did go to the place, after the mortgage was given, he found the store open, and the clerk in attendance, and does not appear to have made any objection, or even inquiry. If this does not amount to express proof that he thereby knew that sales of the mortgaged goods were in progress, and the business was carried on without any regard to the mortgage, it certainly points strongly in that direction.

Now, I think it clear that if the only issue in this case had been, was this mortgage delivered and received upon an understanding, and with the intent, that the mortgagor should continue to deal with the goods in the store as his own, "trading" with them and selling as opportunity offered, and appropriat-

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ing the avails to his own use? and the jury had found in the affirmative on that issue, their verdict could not be declared without sufficient evidence to support it. If, not, then the mortgage being altogether void, if void as to the goods, for the reason so found, the Defendant was entitled to the instruction asked, and to have the jury pass upon the question. Upon this ground I think the judgment should be reversed, and a new trial granted.

All reverse, except MILLER, J., not voting.

Reversed.

JOEL TIFFANY,
State Reporter.

ELLERY G. WILLIAMS, RESPONDENT, *v.* DANIEL H. FITZHUGH ET AL., EXECUTORS OF ALLEN AYRAULT, APPELLANTS.

Mortgage on Land in another State—Jurisdiction—Promissory Notes—Usury—Void in part.

Where a mortgage is given to secure the payment of notes, a part of which are usurious, the mortgage is wholly void. But if the mortgagor applies to a Court of Equity to compel the surrender and cancellation of the mortgage as a cloud upon his title, he must pay the amount due upon the notes not usurious.

THE Plaintiff sought in this action a judgment declaring certain six notes (made by the Plaintiff, and given to the Appellants' testator, Ayrault)—two dated April 3, 1854, for $5,000 each, and four dated July 1, 1854, for $5,000 $6,000, $6,000, and $4,000 respectively, amounting in the aggregate to $31,000, anid a mortgage upon land in Ohio, given by the

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Usurious Contracts—Relief. 43 *N. Y.* 199; 185 *N. Y.* 453; 2 *T. & C.* 17; 64 *Barb.* 627; 52 *How. Pr.* 400; 41 *Misc.* 639 (85 *N. Y. Supp.* 258); 41 *Super Ct.* 386.

Mortgage—Land in other state—Usury—Law governing. 41 *N. Y.* 314.

Mortgage—Land in other state—Jurisdiction. 42 *Hun,* 25 (3 *St. Rep.* 363; 11 *Civ. Proc.* 343; 25 *Week. Dig.* 252).

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Plaintiff to secure the payment of six notes, void for usury, and adjudging and decreeing that they be given up, cancelled, and discharged, and forbidding the prosecution of an action already commenced in one of the Courts of Ohio upon two of those notes, or any other action upon any of the said notes or the said mortgage. The original Defendant, Allen Ayrault, having died pending the action, the action was revived against the Appellants, his executors.

The action was tried at Special Term, in the Supreme Court; and to sustain the action the Plaintiff produced a record of judgment, which set forth the alleged transactions in which the notes were given, and by which one of the notes, dated in July, was adjudged void for usury; and upon the evidence contained in the record, the Judge, at Special Term, found that all of the six notes were so void, and a judgment was rendered declaring the notes and the mortgage to be void for usury, and that the Appellants deliver up the notes and mortgage to the Plaintiff, to be cancelled, and execute a discharge of the mortgage in such form that it may be recorded in Ohio, so that it may be discharged of record and cease to be a lien upon the real estate described in it; and further enjoining the prosecution of an action (found to be thus pending) on some of the notes in one of the Courts of Ohio, and awarding to the Plaintiff his costs.

On appeal to the General Term, the Supreme Court modified the judgment so as to except from the operation thereof the two notes for $5,000 each, dated April 3, 1854, on the ground that the before-mentioned record did not necessarily decide that those two notes were usurious; and they adjudged that in all other respects the said judgment be affirmed.

The executors (Defendants below) appealed to this Court.

Scott Lord for the Defendants, Appelants.

George F. Danforth for the Plaintiff, Respondent.

WOODRRUFF, J.—The principal question which was discussed on this appeal, and which includes nearly all of the subordinate questions raised, is, will the Courts of this State entertain a bill to declare void, and compel the cancellation of a

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mortgage of lands lying in another State, and executed there in pursuance of a contract entered into in this State to secure loans made and payable in this State, some of which loans are usurious and void by our laws?

This question may be intelligibly discussed by inquiring, first, would such a bill be entertained under the same circumstances if the lands were situated in this State? And second, how is the question affected by the location of the lands without our jurisdiction? And third, should the Court require the surrender and discharge of such a mortgage, without the payment of the loans which are not found to be usurious?

1st, then, suppose the lands were situated in this State.

It cannot be denied, indeed I do not understand the counsel for the Appellants to question, that such a mortgage is void by the law of the State of New York. Our statute declares that "all . . . assurances, conveyances, all other contracts or securities . . . . . whereby there shall be reserved or taken, or *secured,* or agreed to be reserved or taken," any greater sum or value for the loan or forbearance of money than at the rate of seven per cent per annum, "shall be void."

The proposition is, that a security given to secure the payment of money is void if it be given to secure a usurious loan; and if it be so given, the fact that it was also given to secure loans which were not usurious will not preserve it from entire condemnation. If void in part, it is void altogether.

The late learned Ch.J. Jones, in the Fulton Bank *v.* Benedict (1 Hall S. C. R. 480, 546), thus states the proposition: "It is well settled that if any part of the loan or debt for which the note or security was given is usurious, the security is void;" referring, among other cases, to Harrison *v.* Hannel (5 Taunt. 780). Jackson *v.* Packard (6 Wend. 415) it is held if a mortgage be given to secure a sum of money, consisting of one loan made prior thereto, which is usurious, and another which is free from usury, the mortgage is void. "If a mortgage, or any other security, is given for two or more antecendent loans, either of which was infected with usury, the whole security is void." That under the statute "there is

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no such thing as such an instrument being void in part, and good for the residue; the taint of usury desroys the whole security." The debt which was free from usury may be recovered, but the mortgage is void (Rice *v.* Welling, 5 Wend. 595); and in Hammond *v.* Hopping (13 Wend. 505) the same doctrine is reasserted in reference to contracts generally. "The statute against usury renders any contract infected with it utterly void; but if the usurious security was given in part for a pre-existing valid debt, that debt is not destroyed by the illegal security." These decisions have stood as the law of this State for more than thirty years, and I am not aware that their correctness has been questioned in any of our Courts.

2d. If, then, the mortgaged premises were in this State, have our Courts jurisdiction to decree that the mortgage be given up and cancelled, and is it error upon the facts assumed to do so?

The statute is (§ 4), "Whenever any borrower of money . . . shall file a bill in chancery for *relief* or discovery against any violation of the provisions . . . of this act, it shall not be necessary for him to pay, or offer to pay, any interest or principal on the *sum or thing loaned,* nor shall any Court of Chancery require or compel the payment . . . of the principal sum or interest, or any portion thereof, as a condition of granting relief." (§5) "Whenever it shall satisfactorily appear by the admissions of the Defendant, or by proof, that any . . . . assurance, pledge, conveyance, contract, security, . . . has been taken or *received* in violation of the provisions . . . . . of this act, the Court of Chancery *shall declare* the *same to be void,* and enjoin any prosecution theron, and *order the same to be surrendered and cancelled*" (Laws 1837, ch. 430).

This language, taken literally, seemed not only to confer jurisdiction, but absolutely to require the Court of Chancery to decree the surrender and cancellation of securities infected with usury, of whatever description, whenever the borrower saw fit to invoke the interposition of the Court, without the aid of any other ground for coming into that tribunal than the fact of usury.

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But the Chancellor, in Perrine *v.* Striker (7 Paige, 598), held that where the party had a full and complete remedy at law, he could not come into the Court of Chancery for relief. That this statute was not intended "to compel the Court of Chancery to take jurisdiction of every question of usury, although a perfect remedy, both as to discovery and relief, could be had in the Court of law." Hence, where the parties to a note not negotiable sought a discovery and perpetual injunction against a suit thereon (although the statute authorized the examination of the Plaintiff in the suit at law on the trial), on the ground that it was usurious,, the bill was dismissed, because the remedy was complete at law. But he recognized the jurisdiction and the propriety of its exercise when there were any special circumstances which made the remedy at law ineffectual or incomplete. In Morse *v.* Hovey (9 Paige, 197), on dismissing the bill, the Chancellor affirms the decision in Perrine *v.* Striker, and expounds it more fully, thus: "The Legislature did not intend to transfer to this Court concurrent jurisdiction with Courts of law in every case of a usurious contract, but merely to give to this Court the power to exercise its jurisdiction in those cases where it was necessary to aid the defence of usury, or to remove *usurious securities which were a cloud upon the Complainant's* title to real property, or which might be used at law to his injury, in such a manner that he could not interpose a legal defence to a suit on them in a Court of law. Here the note is *negotiable*, so that it may be sued in the name of a third person; and if the bill had contained an allegation that the usury could only be proved by the oath of the Defendant, it might possibly have presented a case for the interference of this Court."

Conceding that this relaxation of the stringent and imperative language of the statute is reasonable, no construction of the statute has gone further.

Accordingly, bills by borrowers to remove usurious securities which are a cloud upon the Complainant's title to real property, have uniformily been entertained. See Cole *v.* Sav-

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age (10 Paige, 583), questioned without impeaching the general doctrine (Post *v.* Bank of Utica, 7 Hill, 391; Peters v. Mortimer, 4 Edwd. Ch. R. 279; Pearsall *v.* Kingsland, 3 Edwd. Ch. 195; Dry Dock Bank *v.* Am. Life Ins. & T. Co., 3 Comst. 361; Schermerhorn *v.* Talman, 14 N. Y. 93; Manice *v.* Dry Dock Co., 3 Edw. Ch. R. 143).

It is no answer to such a bill that the mortgagor has a good defence to a bill for the foreclosure of the mortgage. It is an apparent incumberance on the land. Its invalidity depends upon extrinsic facts. The doctrine of Cox *v.* Clift, cited by the Appellant (2 N. Y. 123), that the Complainant has a perfect legal defence against it (when a right under it is asserted) "written down in the title-deed," has no application to it; and Ward *v.* Dewey (16 N. Y. 519) was decided on these grounds.

The mortgage is an impediment to the sale of the land for its value. The mortgagor is not bound to wait until the mortgagee attempts a foreclosure; not only for these reasons, but because, in the meantime, it may become impossible to prove his defence. If this be so, then if the lands mortgaged were situated in this State, the mortgage in question was wholly void, and there is sufficient ground for invoking the interposition of the Court to decree that such a mortgage be surrendered, and cancelled or discharged. Whether it should be so discharged without the payment of that portion of the debt which has not been adjudged to be usurious, and which, for the purposes of this appeal, is to be deemed both legally and equitably due, will be presently considered.

Second. How, then, is the question affected by the circumstance that the mortgaged premises are situated in the State of Ohio, where the mortgage was executed?

The mere circumstance that the land is in another State can, upon no principle that I can discover, furnish a reason for denying the jurisdiction of our Courts, or for questioning the propriety of its exercise. If, when an instrument has been obtained by fraud, a Court of Equity, having jurisdiction of the fraudulent party, will compel him to do equity, will declare the instrument void, and decree a reconveyance, or the execu-

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tion of such instrument as may be requisite to the protection of the innocent party, it is not because the case of fraud is peculiar in that respect, but because the Complainant is entitled to relief which lies in part, at least, in a remedy against the person to compel him to do equity. In such case it would be possible to say to the Complainant, you can defend in the foreign State or county any claim founded on the instrument fraudulently obtained—nay, you can there institute your proceeding and obtain a decree in rem that will protect your land.

That is no answer. The Court here will act directly upon the person, and compel him to give up the title, or apparent right so acquired, and restore the aggrieved party to his former condition. This is well shown in DeKlyn *v.* Watkins (3 Sanfd. Chy. 185, and cases there cited).

So, specific performance of contracts for the conveyance of land in another jurisdiction, although a foreign country, will be decreed, if the Court obtain jurisdiction of the person (Ward *v.* Arredondo, Hopkins' Ch. 213; Mitchell *v.* Bunch, 2 Paige, 615, 616).

So, to compel the performance of a trust in lands, though granted in a foreign jurisdiction, a bill will lie in our Courts. In Massie *v.* Watts (6 Cranch, 158), Chief-Justice Marshall states, that where the Defendant is liable to the Plaintiff, either in consequence of contract, trust, or of any species of malâ fides, the principles of equity give the Court jurisdiction wherever the person may be found, notwithstanding the title to lands out of the jurisdiction may be involved; and the cases collected in 2 White and Tudor's Leading Cases in Equity (Penn v. Lord Baltimore, p. 664), and the notes thereto in the American edition (Law Library, vol. 56, N. S., p. 308), show that this jurisdiction is exercised in England, whether the lands are within the jurisdiction of the Court or not, and even when not within the realm (see also the American cases there collected).

I am entirely unable to discover any difference in the application of the principle governing those cases, to them and to the case under consideration. Whenever the Court have, by

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reason of the equitable rights of the Complainant, a power or duty to act upon his person, to compel the execution of a deed, to set aside a conveyance, or to perform a trust, the location of the lands affected in another jurisdiction forms no impediment to the jurisdiction, nor any reason why it should not be exercised. The specific facts out of which the right of the Plaintiff in equity arises cannot affect the rule.

If, then, the mere fact that the lands mortgaged by the Plaintiff are situated in Ohio, is no defence, does the circumstance that the Defendants' testator, in his lifetime, commenced a suit upon some of the notes secured by this mortgage, in one of the Courts in Ohio having jurisdiction, and that the present Plaintiff set up as a defence the same matters which are alleged in his complaint here, and demanded that the mortgage be cancelled, make any difference? It seems to me that the short but conclusive answer is, that the pendency of another action for the same cause in another State, though prosecuted by the same Plaintiff, is no bar to an action in this State; still less can the pendency of a suit prosecuted by the Defendant, and under his control, to be proceeded in or abandoned at his pleasure. Besides, the suit can in no just sense be said to be prosecuted for the same cause. The one is to collect "some of the notes," the other is to compel the surrender of the notes and the security given for their payment.

It would be a novelty to hold that a Plaintiff could not prosecute and maintain his affirmative rights in this State, because he was asserting those rights for his protection in defending a prosecution by his adversary in another jurisdiction.

It has, however, been suggested that the judgment in this case is erroneous, because, although by the law of this State a mortgage given to secure two demands, one valid and the other void for usury, is wholly void, such is not the law of Ohio; that there the mortgage is valid and effectual as a security for the debt which is not usurious. In the first place, no such fact is found by the Judge who tried the cause, and no evidence was given on the trial to that effect, and no such point appears to have been in any manner raised below. In the next place,

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the whole contract was entered into in this State, and to be performed in this State. True, the mortgage appears to have been executed, or at least the execution of the mortgage to have been acknowledged, in Ohio; but it was delivered here in pursuance of a contract made here to secure the payment of notes made and payable here.

I think the right of the Plaintiff to its surrrender and cancellation is to be determined by our laws, and not by the laws of Ohio; and if the transaction through which it was to become an operative security gave to the Defendants' testator no title to hold it as a security by the law of the place where the contract was made and was to be performed, then the Courts of this State should decree its surrender and discharge upon such terms (if any) as they may properly impose.

In short, it is a security given and received by the Defendants' intestate in this State, "in violation of the provisions" of the statute of this State. Although it was received as security for notes not found to be usurious, it was none the less received in violation of the statute, for the reason that, by its very terms, it secured some notes which were usurious. It is to be observed that no complaint is made, nor any claim of error is urged on this appeal, that it was erroneous upon the facts found to pronounce the four notes dated July 1, 1854, to be usurious and void, and direct their surrender.

Third. The question raised by the present appeal relates simply to that part of the decree which requires the surrender and cancellation or discharge of this mortgage, and not to that part which directs the surrender of the four notes adjudged usurious.

The mortgage is void. No action can be maintained thereon in this State in any form, and it is a cloud upon the title to the lands of the Plaintiff.

Does it follow that the decree in this action, so far as it directed the surrender and discharge of the mortgage, was warranted by well-established rules of equity applicable to the subject? It is familiar doctrine in Courts of Equity, that "he who seeks equity must do equity." And without that, the

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Court of Equity will not extend its arm for the relief of the suitor.

If he could protect himself, either in whole or in part, at law, if he could defend when assailed, very well; he could decline any concession of the equitable rights of the adverse claimant, and stand upon his legal position. It might be safe, or it might be in peril; but if he invoked equitable interposition, he must come with clean hands, and prepared to do whatever in the judgment of equity was fair and equitable to his adversary, else the Court would not entertain him, but would answer, stand upon your legal rights, or come here and perform the just condition of equitable relief. It cannot be doubted, therefore, that when a party comes into a Court of Equity to remove a cloud upon the title of his land, he must do whatever it is equitable that he should do before the Court will interfere. In that respect he stands in no other or better condition than he who comes to compel the specific performance of a contract to convey. He must come prepared to pay and perform all that, by the conditions of the contract, he was bound to pay or perform. He who comes to set aside a conveyance obtained from him by fraud, must come prepared to restore all that he received as the consideration of such conveyance. And on precisely the same ground it was the well-settled rule of Courts of Equity, that he who came into that Court to set aside a conveyance or other security as void, because given to secure a usurious loan, must come prepared to pay so much as he had in fact received. He might stand on his legal rights, and defend any and every endeavor to compel him to pay; but if he invoked the aid of a Court of Equity to give him affirmative relief, that Court recognized his equitable obligation to refund what he had received (Rogers *v.* Rathbun, 1 Johns. Ch. 367; Tupper *v.* Powell, 1 John. Ch. 439; Fanning *v.* Dunham, 5 John. Ch. 122, 137; Morgan *v.* Schermerhorn, 1 Paige, 544; Fulton Bank *v.* Beach, 1 Paige, 429; S. C. 3 Wend. 573; Taylor et al. *v.* Bell et al., 2 Vern. 171; Whitmore *v.* Francis, 8 Price, 616.)

On what ground is the Plaintiff in this case entiteled to have

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his mortgage set aside without qualification or condition? The notes which he had given to secure a usurious debt are declared void, and ordered to be given up to be cancelled. He cannot be prosecuted upon his mortgage in any form in this State, because, by law, it is void. If he has need of further equitable interference, it is because the mortgage is an apparent lien, a cloud upon the title to his land, and he should be relieved therefrom.

Why, then, if he asks further equitable relief, and invokes the further interposition of a Court of Equity therefor, should he not do equity? Why should he not pay to the Defendant what he in fact received.

The answer, and the only answer which is or can be suggested is, that our statute declares (Laws of 1837, chap. 430, §4) that "Whenever any borrower of money, goods, or things in action, shall file a bill in chancery for relief or discovery, or both, against any violation of the provisions of [the title of the statutes concerning the interest of money], or of this act, it shall not be necessary for him to pay, or offer to pay, any interest or *principal on the sum or thing loaned,* nor shall any Court of Chancery require or compel the payment or deposit of *the principal sum or interest,* or any portion thereof, as a condition of granting relief, or compelling or discovering to the borrower, in any case, *usurious loans* forbidden by the said title or by this act." This section of the act of 1837 was passed to extend the previous title to cases in which the Court was applied to for discovery, as well as cases in which relief alone was sought, and to relieve him from paying any part of the principal or interest, in either case, and it should therefore be read and construed in connecteion with such previous law, which is as follows (1 Rev. Stat., p. 772, § 8): "Whenever any borrower of any money, goods, or things in action, shall file a bill in chancery for a discovery of *the money, goods, or things in action, taken or received in violation of either of the foregoing provisions,* it shall not be necessary for him to pay, or offer to pay, any *interest* whatever on *the sum or thing* loaned; nor shall any Court of Equity require or compel the payment or deposit of *the principal sum,* or any part thereof, as a con-

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dition of granting relief to the borrower, in any case of a usurious loan forbidden by this chapter." (See Livingston *v.* Harris, 3 Paige, 528; S. C. on appeal, 11 Wend. 329. See the history of this legislation in Post *v.* Bank of Utica, 7 Hill, 391, et seq.)

What, in these statutes, is the principal sum or interest which the borrower shall not be required to pay? Is it not the "usurious loan," and the interest thereon? Is it not *the* money, goods or things in action taken or received in violation of the provisions of the act? Most clearly that, and only that. It does not contemplate, it is true, the existence of any other equitable condition; but it by no means requires that any other condition should be waived. The subject dealt with is a loan upon usury; it designs that there shall be no means, direct or indirect, in which the payment of such a loan, or any interest theron, shall be compelled, either by a Court of Law or Equity, and relief against such payment accomplishes the end so far as this statute directs relief to be given. Hence, the discovery spoken of, and authorized by the statute, is a discovery of *the money,* &c., taken or *received* in *violation* of the statute, and not money which, not being so received, the borrower is bound, both at law and in equity, to repay; and it is the *principal* or interest on *the* sum or thing loaned in violation of the statute, the payment of which cannot be required as a condition of relief.

It follows that where a contract or obligation is given for two or more separate and independent things, having no connection with each other, and one of them is the security of a usurious debt, although the contract or obligation is altogether void, for reasons above given, and no action at law or elsewhere could be maintained thereon,—nevertheless, if a party comes into a Court of Equity to ask that it be surrendered, all that the statutes of usury have done affecting the Complainant's right to relief is, to forbid that any payment on account of such debt shall be made a condition of relief. As to other conditions the statute is silent, and the Court is left to administer relief upon those principles which govern the subject generally.

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When, therefore, the Plaintiff asks that a mortgage be cancelled as a cloud upon the title to his lands, and that a Court of Equity shall so direct in virtue of its power and its disposition to enforce his equitable rights, the Court may not require that he pay a usurious debt, or any part thereof, or any interest thereon; but it may require the performance of any other duty which is just to the adverse party, unembarassed by the statutes in question.In equity, the mortgagor in such case stands in reference to debts not usurious, secured by the mortgage, in the same attitude as a Complainant seeking to redeem.

He must pay what at law and in equity he owes.

Nor is this any departure from the doctrine already stated, that the mortgage being void in part, because given to secure a usurious debt, is void altogether. Upon that doctrine the if he can, defend himself and the title to his lands, whenever Plaintiff, if he see fit, may rely, and on that ground he may, and wherever assailed; but if he asks affirmative action and interference from a Court of Equity, to set aside the mortgage and adjudge its surrender, he must do equity by paying his just debt not impeached for usury.

The most that the Court below should have done was to adjudge that so much of the apparent debt as was secured by the four notes dated in July, 1854, found and adjudged (by the decree as modified by the General Term of the Supreme Court) to be usurious, was void; that the said notes be surrendered to be cancelled, and that the Defendants be enjoined against the prosecution of any suit upon those four notes.

The judgment should be modified to conform to these views, without costs to either party on the appeal; and the judgment rendered at the Special Term, so far as it adjudged or decreed the surrender or discharge of the mortgage, should be reversed, and so far as it awarded costs to the Plaintiff, should be further reversed and modified so that neither party recover costs of the other in this action.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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ALEXANDER J. COFFIN, APPELLANT, .v JAMES REYNOLDS, EXECUTOR, &C., RESPONDENT.

Practice— Dismissal of Complaint—Powers of Referee—Stockholders' Liability for Service rendered to Corporation.

Under the Code a referee has a right to dismiss a complaint on the ground that it does not contain sufficient facts to constitute a cause of action.

A secretary of a manufacturing corporation is not a laborer or servant of the corporation in such a sense as to render a stockholder of the corporation liable for his services as secretary, under the 18th Section of the Act authorizing the formation of manufacturing corporations (3d Edm. St. at Large, p. 736).

THIS action is brought to recover from the estate of Elias Reynolds, who was a stockholder in a corporation called the Westchester Iron Company, an alleged debt of some $1,800, for services claimed to have been performed for the company by Robert J. Coffin, the assignor of the Plaintiff.

The complaint avers that a judgment was recovered in favor of the Plaintiff against the company; the issuing of an execution thereon, and its return unsatisfied; and that the company was indebted to Robert J. Coffin for services as secretary of said company, and otherwise, in the amount claimed.

Corporations—Preferred claims—Who employee. 46 *N. Y.* 524; 58 *N. Y.* 367; 61 *N. Y.* 282; 76 *N. Y.* 53; 90 *N. Y.* 218; 98 *N. Y.* 596; 153 *N. Y.* 615; 158 *N. Y.* 159; 16 *Hun,* 188; 28 *Hun,* 497; 29 *Hun,* 41; 32 *Hun,* 39; 45 *Hun,* 343 (10 *St. Rep.* 310); 57 *Hun,* 583 (33 *St. Rep.* 323; 11 *N. Y. Supp.* 314); 42 *How. Pr.* 113 (12 *Abb. N. S.* 254; 33 *Super. Ct.* 571); 1 *Abb. N. C.* 130; 34 *Super. Ct.* 309; 25 *Misc.* 35 (54 *N. Y. Supp.* 411); 26 *St. Rep.* 474 (7 *N. Y. Supp.* 230).

Pleadings—Sufficiency—When may be raised. 33 *App. Div.* 41 (53 *N. Y. Supp.* 520); 8 *Misc.* 476 (60 *St. Rep.* 604; 29 *N. Y. Supp.* 549); 20 *Misc.* 699 (46 *N. Y. Supp.* 529); 22 *Misc.* 252 (49 *N. Y. Supp.* 1007).

Dismissal—Complaint—Discretion—Referee. 51 *N. Y.* 317; 76 *N. Y.* 400; 10 *Misc.* 166 (62 *St. Rep.* 484; 30 *N. Y. Supp.* 830); 20 *Misc.* 699.

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The cause was referred to a referee, and upon the trial before him, and before any testimony was taken, the Defendant's counsel moved to dismiss the complaint, on the ground that it did not set forth a cause of action, and this for the reason that the complaint does not allege that Coffin performed any services for the Westchester Iron Company as their laborer, servant, or apprentice; and that under the complaint no claim is made, and no evidence can be given of any services by said Coffin as laborer, servant, or apprentice, if any such services were in fact performed. Some other grounds are stated, but, in the view taken by the referee, and upon which he held that the complaint did not state a cause of action, and rendered a judgment dismissing it, with costs, they need not be specially noticed. On an appeal to the General Term, in the Third District, the judgment was affirmed, and comes to this Court by appeal from the judgment there rendered.

James Emott for Appellant.

R. E. Andrews for Respondent.

BACON J.—On the appeal to the Supreme Court a question seems to have been made that the referee erred in disposing of the case upon the pleadings. That question is not presented in the Appellant's points, although elaborately argued by the Respondent.

It was clearly right to entertain the application in that stage of the case, since the Code provides that the specific objection that the complaint does not state facts sufficient to constitute a cause of action, need not be taken by answer or demurrer, but is available in any stage of the action. The practice adopted by the referee has been sanctioned by several adjudications, and is very commonly resorted to at the Circuit, sometimes after the evidence is all in, when it performs the office substantially of a motion in arrest of judgment or for judgment non obstante veredicto, under the old practice, and where the point is plainly and clearly presented in the pleadings, upon the Plaintiff's opening, and without going into evidence at all. (See Gould *v.* Glass, 19 Barb. 195; Ludington *v.* Taft, 10 Barb. 447; Emery *v.* Pease, 20 N. Y. 63.) No evidence which could

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have been given under the pleadings would have changed the result, and a protracted trial was unnecssary to reach it.

The question involved in this case is simply the true construction of the 18th section of the Act of 1848, authorizing the formation of corporations for manufacturing, mining, and mechanical purposes. That section is as follows: "The stockholders of any company, organized under the provisions of this act, shall be jointly and severally individually liable for all debts that may be due and owing to all their laborers, servants, and apprentices, for services performed for such corporations." The averment in the complaint in this case is, that the debt claimed was due to Robert J. Coffin for services performed by him for the company "as secretary, and otherwise." Does this bring him within the protection of the statute? It will not, of course, be pretended that he was an apprentice, nor hardly can it be claimed that he was a laborer, and the inquiry is substantially reduced to the question, was he a servant? The point is a narrow one, and hardly calls for or is susceptible of much elaboration, and a few words, it seems to me, will dispose of it.

As an original quesiton of construction, I think the scope and purpose of the statute was to protect the classes most appropriately described by the words used, as those engaged in manual labor, as distinguished from officers of the corporation, or professional men engaged in its service; in short, to furnish additional relief to a class who usually labor for small compensation to whom the moderate pittance of their wages is an object of interest and necessity, and who are poorly qualified to take care of their own concerns, or look sharply after their employers.

A secretary is an officer of the company, not only appurtenant to such corporations as matter of common arrangement and experience, but spoken of in the act under which these corporations are organized. The allegation that Coffin performed services as secretary was not, therefore, an allegation that he was a servant of, or laborer in the employment of the company; neither did the words, "and otherwise," enlarge the scope of the claim. The Defendant, if liable, is so strictly

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under the provision of the statute; and the necessary condition to a recovery for services claimed to have been performed is, that they must have been rendered by one who is a laborer, servant, or apprentice. The complainant, in order to attach a liability to a stockholder, must show services of the particular kind designated in the statute, and the words, "and otherwise," are either insensible, and to be rejected when sought to be applied to a stockholder's liability, or they must be considered as referring to services performed in the several capacities enumerated by the statute, which brings us directly back to the question with which we started.

If we were to attach to these words any larger meaning, we should be giving the statute a construction which would make it cover every kind of service, while its plain import and intent is to afford protection to a specific class, enumerated with care and discrimination.

An admission that Robert J. Coffin performed services for the company otherwise than as a secretary, may very well be made, and yet that admission will not charge this Defendant, who can only be made liable for that particular kind of service which the statute specifies. In short, no cause of action arising under, or created by a statute, is stated, unless the complaint of the party seeking by its aid to recover, brings his case clearly within it.

Upon the cases, so far as they have spoken of this question, the weight of authority is, I think, decidedly with the Defendant. In Conant *v.* VanSchaick (24 Barb. 87), the claim was made under the general railroad act of 1850, attaching liability to the stockholders of railroad incorporations for debts due to any of its "laborers or servants," for services performed for the corporation. The Plaintiff sought to recover for services performed by him as a civil engineer for the company, and for the services of a roadman employed by him. The Court held the Defendant liable, on the ground that Conant was a servant of the company; but in the opinion the Court is careful to note a distinction which exists in this case, to wit: that the words of the statute will "apply to all persons employed

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in the service of the company who have not a different proper and distinctive appellation, such as officers and agents of the company." In Ericsson v. Brown (38 Barb. 390) the action was brought by a consulting engineer against the Defendant, as stockholder in a company where the liability imposed was for debts due to "the laborers and operatives" of the corporation. The language is not as broad as in the case before us, but the Court held that the Plaintiff was not within the words or spirit of the act; that his services were professional, as distinguished from manual, and that the statute was intended to protect men who work with their hands, rather than their heads. While, therefore, the services of the Plaintiff might involve some manual labor, that was the incident rather than the principal of the service. The case, while it differs from the one at bar, circumstantially enunciates, a principle clearly applicable to it.

But in Aiken v. Wasson (24 N. Y. 482), the Court of Appeals gave a construction to the words, "laborers and servants," as used in the general railroad act, which harmonizes entirely with the judgment rendered in this case. It was there held that a contractor for the construction of a part of the road of the company was neither a laborer nor servant within the act. Judge Selden says the policy of the Legislature was to throw a special protection around that class of persons who should actually perform the manual labor of the company. He adds, what is very pertinent to this case, that "in some very extended sense the directors and other principal officers of the corporation may be considered as its agents and servants, and yet no one would contend that the provision was for their benefit. The word 'servants' is qualified, and to some extent limited, by its association with the word 'laborers,' according to the maxim noscitur a sociis." If a contractor, who not only oversees and directs labor, but usually performs a part of it himself, is not a servant, surely a secretary, an officer of the company, whose duties involve ordinarily a minimum amount either of head or hand work, comes very far short of being embraced in that class.

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The only case having a semblance of authority to the contrary is Richardson v. Abendroth (43 Barb. 163).

No opinion is given in the report of that case, but allusion is made to one which seems to have been rendered on some former occasion, and by which Judge Allen, who tried the cause, felt himself concluded, for he says the law of the case then before him was, that the secretary of a manufacturing company, under the law of 1848, is a servant within the 18th section of that act. He held the Defendant was not liable, upon another ground, and his decision was affirmed by the General Term in the First District, upon the ground stated by him; and no reference is made to the other point.

It would have been more satisfactory if the opinion to which allusion is thus made, if in point of fact any was ever given, had been reported or furnished in some form to the Court, that we might have duly weighed and appreciated the grounds on which it proceeded. In the absence of such an opinon, the case can hardly be regarded as an authority, or if entitled to consideration, must be deemed quite outweighed by those we have cited, and which conduct us to a different conclusion.

I am also of the opinion that it was a condition precedent to the liability of the Defendant that an action should have been commenced against the corporation within a year after the debt became due. There is no averment in the complaint to that effect, nor is anything stated from which it can be learned when the debt accrued. Without such an averment, no liability on the part of this Defendant is shown.

The judgment should be affirmed.

GROVER, J.—Two questions are presented by the exceptions taken by the Appellant in this case. First, whether a referee, upon trial of issues of fact, has power to dismiss the complaint upon the ground that it does not contain facts sufficient to maintain an action; second, if such power is possessed, whether the facts set out in the complaint in the present case show a cause of action?

As to the first question, there can be no doubt. An examination of the Code, from § 143 to 148, will show that the ob-

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jection is not waived by failing to present it either by demurrer or answer.

All that the Plaintiff is entitled to prove, to establish his right of action, are the facts contained in the complaint; and it would be absurd to hold that the referee could not dismiss the complaint, but, after the facts were proved, might nonsuit the Plaintiff on the ground that the proof failed to show a right of action.

In trials before referees judgment is entered upon the report, and there is no opportunity to move in arrest, on the ground that the complaint shows no cause of action. It therefore follows that the referee may dismiss the complaint on this ground.

The possession of this power by the referee was assumed in Emery *v.* Pease (20 N. Y. 62; see also Ludington *v.* Taft, 10 Barb. 447; and Gould *v.* Glass, 19 Barb, 195).

The real question in the case is, whether the facts set out in the complaint showed a right of recovery by the Plaintiff against the Defendant, as stockholder of the company. I think it must be assumed that the averments of the commencement of the action, and recovery of judgment against the corporation, were sufficient upon the motion to dismiss. That the omission to aver that such action was commenced within a year from the time the cause therefor occurred, ought to have been disregarded by the referee. The cause of action alleged in the complaint is, that the company were indebted to the Plaintiff's assignor for services rendered for the company as secretary, and otherwise. This presents the question whether a stockholder is liable, in case of the insolvency of the company, for the services of its secretary.

The addition of the words, "and otherwise," does not aid the complaint, unless it shall be held that a stockholder is liable for all services rendered the company; and if this be so, it is clear the complaint is good, for in that event he would be liable for services rendered as secretary.

The 18th section of the act authorizing the formation of manufacturing companies, &c., (3 Gen. Statutes, Edm. 736),

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provides that the stockholders of any company organized under the act should be jointly and severally individually liable for all debts that may be due and owing to their laborers, servants, and apprentices, for services performed for such corporation. The question is, whether the secretary of the company is included under the terms used in the statute.

I think he is not; that, although in a certain sense he is a servant of the company, he is not so within the meaning of the statute.

The designe of the statute was to afford protection to a class of employees of the company known as the laborers, servants, and apprentices, and not as officers and agents of the company.

It was deemed proper by the Legislature to leave the latter class to their remedy against the company only. Section 5 of the act provides for the appointment of a president and subordinate officers of the company.

Had the statute designed to include these officers, it would have used terms embracing them; but they are in the last section called officers, and not servants, of the company.

Again: the officers of the company are not within the same reason for special protection as the laborers. The latter are occupied with their labor, and have no means of knowing anything of the pecuniary condition of the company, while the former are usually better acquainted with that than the general creditors.

No reason is seen why the officers should have any additional security for their salaries beyond that of the general creditors.

I think that neither the services of the secretary, nor those of any other officer of the corporation, came within the 18th section, and that a stockholder is not liable therefor.

This accords with the reasoning of this Court in Aiken v. Wasson (24 N. Y. 482), and of the Supreme Court in Ericsson v. Brown (38 Barb. 390), and Conant v. Van Schaick (24 id. 87).

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The precise point was not involved, and therefore not decided, but it was held in Richardson *v.* Abendroth (43 id. 163), that the stockholders were liable for the salary of the secretary. No reasons were assigned therefor, and I think the case in this respect erroneous.

It thus appears that the stockholders are not liable for all services rendered for the company. The addition of the words, "and otherwise," does not therefore import that the assignor had rendered any services for which such liability exists.

From the absence of any proposition to amend, I think the inference probable that the assignor had rendered no such service.

However this may be, the referee was right in dismissing the complaint, and the judgment must be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

ANN DRISCOLL, ADMINISTRATRIX, &C., OF CORNELIUS DRISCOLL, DECEASED, RESPONDENT, *v.* THE NEWARK AND ROSENDALE LIME AND CEMENT COMPANY, APPELLANTS.

Nonsuit—Negligence— Facts for the Jury to determine.

Where Plaintiff's intestate was killed by a stone hurled by a blast of rocks on Defendant's premises while intestate was crossing the same by a footpath in use for many years,—held, that he was not a trespasser on said premises, and was not to be deemed guilty of negligence for crossing said premises according to his daily custom for many years.

Negligence—License—Care. 51 *N. Y.* 490; 57 *N. Y.* 397; 67 *App. Div.* 214 (74 *N. Y. Supp.* 198); 74 *App. Div.* 601 (77 *N. Y. Supp.* 823) 84 *App. Div.* 62 (81 *N. Y. Supp.* 1111); 36 *Misc.* 147 (72 *N. Y. Supp.* 1078).

Railroads—Reasonable care. 81 *Hun,* 158 (62 *St. Rep.* 688; 30 *N. Y. Supp.* 725); 28 *Hun,* 327.

Distinguished. Negligence. 41 *N. Y.* 532; 161 *N. Y.* 299.

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Held, that although the throwing of the stone by the blast, by means of which the intestate was killed, was quite unusual, yet the known possibility of such an event imposed on the Defendant the duty of warning all persons within reach of danger, that they might seek a place of safety at the time of discharging the blast.

WOODRUFF, J.—The intestate was not a trespasser, whether killed when he was on the Defendants' land, or on the land whereof the fee belonged to his employers. The habitual use of the footpath across the quarry lots for many years, without objection, warrants a finding of license from the Defendants to cross their land to go to his house. Indeed, if no such license is to be inferred, the Judge could not, upon the evidence, have nonsuited on an assumption that the intestate was on the Defendant's land when hit. That is in great doubt upon the evidence; and if Defendants wished the question to be submited to the jury, it was probably left to them, as the charge is not given in the case, and no exception was taken thereto.

When picked up, it would seem most probable that he was not on the Defendant's land; and if they deemed it material, it was for them to prove that he was there when struck by the flying stone.

The only other grounds for non suit were: First, that it was negligence in the intestate to be where he was at the time when he was injured. Second, that the Defendants were guilty of negligence in the conduct of their business on their own premises, and where they had a right to carry it on.

They are certainly not liable on the mere fact that the stone was thrown on to the land which, for the purpose of quarrying, they had purchased from the Lawrence Company. Their deed from that company contemplated the continuance of their business, and if guilty of no negligence the Defendants would not be liable.

That the intestate was himself guilty of negligence was not so clearly established that the Judge was warranted in withdrawing the case from the jury *upon that ground.*

He was going to his dinner, as for years he had been accustomed to do. This long-continued habit was, presumptively, with the knowledge and consent of the Defendants.

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The Court could not say that, in using the footpath, he needlessly selected a route of danger which per se amounted to negligence. Only when blasts were discharged was there any danger at all. If it was doubtful whether going home at the hour when it was usual for men to leave work for dinner, and going by his accustomed route when the bell announced to the men the proper time, was negligence in view of the fact that at or about that time the Defendants were in the habit of setting off blasts, then it was proper to submit the question to the jury.

Carolus *v.* The Mayor (6 Bos. 15) bears no clear analogy to this case. There the Defendants, being lawfully engaged in repairing a public avenue, the repair of which necessarily obstructed passing, and having provided a convenient passage around the obstruction, were not held liable for an injury resulting from the Plaintiff rejecting such passage, and recklessly attempting to travel along a bank or elevation not intended to be used as a path, dangerous to be so used, and which the Defendants neither intended nor knew to be so used.

If there be no doubt whether the Plaintiff should have been nonsuited, it arises on the question whether the Defendants were proved guilty of any negligence. The evidence warranted their insisting, with much force, that they were prosecuting their business in a lawful and proper manner on their own land.

They were discharging their blasts at the hour in the day which had long been customary.

The blast which caused the injury was forty feet below the surface, and the forcing of stones to a considerable distance out of the excavation was not to be ordinarily expected.

Blasts of that description, called sand-blasts, are intended to open the crack or fissure in which the powder is placed, and divide the rock or stone, throwing it down, and ordinarily does nothing more. It is only when some unknown defect exists that there is an explosion causing any considerable damage.

They therefore had no reason to anticipate any such effect as resulted on the occasion in question.

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No danger was anticipated by the men employed in the work, except in its immediate vicinity. To those in the vicinity actual notice was given. But, on the other hand, the claim is also urged that such blasts do sometimes produce more violent effects; and in the use of powder for such purposes, such occurrences, though from unseen defects, will be guarded against by men of ordinary prudence; and that it is but a slight measure of precaution against injury to give notice in season to persons who may reasonably be expected to be within range of such explosion.

The hour selected was not while the men were at dinner, but at the very moment when (the bell having just before been struck to notify them of the dinner hour) and it was to be expected the intestate would be passing.

It was at least due to whoever was lawfully within reach, to look and see if persons were near, and if so to warn them.

But in truth notice was not given in season to enable the intestate to reach a point of safety, even upon the evidence most favorable to the Defendants.

What ever doubt I might entertain on the whole proofs, I am clear that under the circumstances it was proper to submit these questions of fact to the jury, and therefore that the motion for a nonsuit was properly denied.

The judgment should be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THEOPHILUS ANTHONY, EXECUTOR AND APPELLANT, *v.* JACOB BROUWER, EXECUTOR, &C., AND OTHERS, RESPONDENTS.

JOHN R. GILL AND OTHERS, APPELLANTS, *v.* JACOB BROUWER, EXECUTOR, &C., AND OTHERS, RESPONDENTS.

Legacy—Lapse by Death of Legatee—Next of Kin—Reversionary Interest.

Where a legacy lapses through the death of a legatee during the lifetime of the testator, the subject-matter of the legacy, on the death of the testator, immediately vests in the next of kin, who, although a legatee under the will, takes absolutely the lapsed estate.

Where a reversionary interest in personal property is not disposed of by the will, it belongs to the next of kin of the decedent, who are entitled to the distributive shares of such unbequeathed interest at the death of the testator.

JAMES GILL, of Poughkeepsie, Dutchess county, died in February, 1856, leaving his last will and testament, which was executed in June, 1841.

At the time of executing his will, he had living two brothers, Theophilus A. and Thomas Gill, and two sisters, Sarah W. Anthony and Ann Gill. Theophilus A. Gill is not mentioned in the will. In and by his will he gives to his brother, Thomas Gill, his heirs and assigns, the one-third of his estate. The remaining two-thirds he gives to his executors, in trust, to convert the same into money, and invest, and to pay over the equal one half of the income to his sister, Mrs. Anthony, during her natural life, and the other half of the income to his sister, Ann Gill, during her natural life.

And upon the death of either of the said sisters, the will directed the executors to pay one-half of the interest secured and payable to the one so dying to the surviving sister, during her natural life, and the other one-half thereof to be paid to the

Wills—Devise—Death of beneficiary—Effect. 33 *Hun,* 373; 65 *How. Pr.* 124; 15 *Misc.* 377 (72 *St. Rep.* 828; 38 *N. Y. Supp.* 431).

Final Accounting—Res Adjudicata. 93 *App. Div.* 518 (87 *N. Y. Supp.* 834); 1 *Dem.* 135; 5 *Redf.* 313.

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brother Thomas Gill; and upon the death of the sister so surviving, the will directed the executors to pay over the whole of the said two shares to his brother, Thomas Gill—and then comes the following expression:

"It being my intention by this, my will, that after the said annuities shall cease to become due and payable, that the said two-thirds, or remainder of my estate, shall go and belong to my said brother, Thomas Gill, to the exclusion of all my other brothers and relations."

Both Thomas Gill and Ann Gill died before the testator. The said Ann Gill died intestate, and the said Thomas Gill leaving John R. Gill, Robert T. Gill, Ann Gill, Elizabeth Gill, and Sarah W. Gill, his children and heirs-at-law.

On the first day of July, 1858, the executor had an accounting before the Surrogate, at which time a decree of distribution was made by the Surrogate, directing the said executor to distribute two-thirds of the amount in his hands, as follows:

One-third thereof to Theophilus A. Gill, the brother, one equal third part thereof to Sarah W. Anthony, the sister, and one-third part thereof to be equally divided, share and share alike, among the before-mentioned children of the said Thomas Gill.

The other one-third of the said estate, amounting to $1,978 61-100, the executor was directed to retain and invest, and pay over the interest thereof to the said Sarah W. Anthony, during her natural life, and at her death to be retained subject to the order of the Surrogate.

The said Sarah W. Anthony died in June, 1864, leaving a will in which her husband, Theophilus Anthony, was made executor.

On the 19th November, 1864, an accounting by the executor, Jacob Brouwer, as to the fund set apart to the said Sarah A Anthony, was had, and a decree was then made by the Surrogate that the principal of the said fund, less the expenses of accounting and commissions, be distributed by the said executor equally between the said Theophilus A. Gill and the before-mentioned children of the said Thomas Gill.

On the 9th of July, 1858, when the said executor paid

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over to the distributors under that decree the share going to them, they each executed a receipt in the following form:

"NEW YORK, July 9, 1858.

"Received of Jacob Brouwer, executor, &c., of James Gill, deceased, three hundred and twenty-three dollars and ninety-five cents, in full for my distributive share, by the decree of which the foregoing is a copy."

These receipts were varied in amount, to meet the shares as distributed by the decree. From this decree of November 19, 1864, Theophilus Anthony, executor and trustee under the will of the said Sarah W. Anthony, took an appeal to the Supreme Court, and the children of Thomas Gill also took a cross appeal, and in their operation on the cross appeal they claim that the decree of July, 1858, was erroneous, assigning the errors; but it does not appear from the papers that any specific appeal was ever taken therefrom, and they do not now claim that any was. It seems, however, that the Supreme Court regarded them as having appealed, and dismissed the appeal as having been made too late; and that Court modified the decree of November 19, 1864, so far as to direct one-third of that fund to be paid to Theophilus Anthony, the executor of the will of Mrs. Anthony, one-third to Theophilus A. Gill, and one-third to the children of Thomas Gill, in equal shares.

From this decree, the children of Thomas Gill have appealed to this Court, and claim to review both decrees.

MASON, J.—If there was an appeal taken from the decree of July, 1858, it certainly was too late, as it was not made until after the decree of November 19, 1864—more than six years after the first decree was made.

The statute limits the right of appeal from such a decree of distribution on the final accounting to three months (2 R. S. 95, § 67).

The decree was final as to the distribution of the two-thirds of the estate, and the parties having given their receipts in full for their distributive shares of this estate, and acquiesced in that decree for over six years, cannot now question it.

It cannot certainly be brought in review here, for no appeal

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has been taken from it. The appeal from the decree of November 19, 1864, cannot be regarded as bringing before this Court the decree of July, 1858.

The only question here for review is the decree of November 19, 1864.

There can be no doubt, it seems to me, that both the Surrogate and the Supreme Court were right in holding that, as Thomas Gill and Ann Gill died before the testator, their legacies lapsed; nor did it alter the rule that these legacies were to them, their heirs and assigns (Mowatt *v.* Carow, 7 Paige R. 328; Bishop *v.* Bishop, 4 Hill R. 138; Van Beuren *v.* Dash, 30 N. Y. R. 393).

It was expressly decided by this Court, in the latter case, that our statute to prevent lapses in devises in certain cases does not apply to collateral relatives.

The word descendant, used in this statute, is limited to issue in the legal sense.

The Surrogate most certainly erred in holding that the bequest of the life estate to Mrs. Anthony, excluded her, or rather, her next of kin, from any other interest in this one-third set apart for her use during life, than such life estate. The residue after the life use of Mrs. Anthony was, by the will, given to Thomas Gill, and as he died before the testator, this estate lapsed, and immediately vested in the next of kin, and Mrs. Anthony in her lifetime might have claimed the one-third absolutely as her own. Not that the will gave it to her, but that she was entitled to it as next of kin, because it was undisposed of by the will, and she was entitled to it under the Statute of Distributions.

The case of Hoes and others *v.* Van Hoesen (1 Barb. Ch. R. 379) is in point. That case decides that where a reversionary interest in personal property is not disposed of by the will of the testator, it does not necessarily belong to those who may happen to be the next of kin, at the termination of the particular estate or interest in such property which is bequeathed by him. But, as an interest in property undisposed of by the will, it belongs to the next of kin of the decedent, who were entitled

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to the distributive shares in such unbequeathed interest at the death of the testator.

This is upon the familiar doctrine, that where a legacy or bequest of personal property lapses, it immediately vests in the next of kin of the testator, subject to the use of the first taker, or to the execution of any valid trust, for the benefit of such person (24 N. Y. R. 9; 40 Barb. R. 286; 25 Wend. 119).

It follows that the Surrogate was wrong in depriving Mr. Anthony, as the legal representative of the estate of his wife, of the one-third share; and the Supreme Court was right in modifying the decree in this respect. There is no ground for the claim presented by these Appellants, the children of Thomas Gill, deceased. They cannot bring their claim within the rule upon which they base it. The expressions in this bequest, to Thomas Gill, his heirs and assigns, cannot upon any rule of construction be held to evidence the intention of the testator to provide a substitute for the legatee in case of his death.

The bequest is not to Thomas Gill or his heirs, nor is it a case where we have a right, upon any rule of construction, to convert "and" to "or."

There is nothing in the whole will from which any intention of the testator can be deduced to substitute the children of Thomas Gill, as his legatees, in the place of their father, should Thomas Gill die before the testator.

The decree of the Supreme Court is most clearly right, and I advise that it be affirmed, with costs to the Respondents, to be paid by the Appellants personally.

BACON, J.—This is an appeal by John R. Gill and others, the children and heirs-at-law of Thomas Gill, deceased, arising upon the following facts:

James Gill, deceased, the testator, had, at the time of executing his will in 1841, two brothers and two sisters living, viz.: Thomas Gill, Theophilus A. Gill, Ann Gill, and Sarah Wilhelmina Anthony, wife of Theophilus Anthony, one of the Respondents.

Ann Gill and Thomas Gill both died before the testator, Ann leaving no children, Thomas leaving him surviving five child-

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ren, viz.: John R. Gill, Robert T. Gill, Ann Gill, Sarah W. Gill, and Elizabeth Gill, the Appellants herein,

The testator died February 26, 1856, and left him surviving, as his only next of kin and heirs-at-law, his brother, the said Theophilus A. Gill, his sister, the said Sarah Wilhelmina Anthony, and the said children of his deceased brother, Thomas Gill.

On the 26th day of June, 1841, he executed his last will and testament, which was admitted to probate May 5, 1856.

The testator, by his will, disposed of his property as follows:

First—He gave and devised to his brother, Thomas Gill, his heirs and assigns, one-third of his estate, real and personal.

Second—He directed his executor to sell the remainder of his estate, and to invest the proceeds with the remaining two-thirds of his personal estate, and to pay over one-half of the income to his sister, Sarah Wilhelmina Anthony, during life, and the other half to his sister, Ann Gill, during life.

Upon the death of either sister, he directed his executors to pay one-half of the interest payable to her so dying, to the surviving sister, and the other half to his brother, Thomas Gill.

Upon the death of the surviving sister, he directed the whole of the sum so invested to be paid to his brother, Thomas Gill.

And added after the above, the following declaration:

"It being my intention by this, my will, that after the said annuities shall cease to become due and payable, that the said two-thirds, or remainder of my estate, shall go and belong to my said brother, Thomas Gill, to the exclusion of all my other brothers and relations."

Theophilus A. Gill, a brother, was not named in the will.

Jacob Brouwer, the executor of said will, rendered an account July 1, 1858, and the Surrogate, by his decree entered that day, directed the executor—first, to invest one-third of the estate for the benefit of Sarah Wilhelmina Anthony, during life, and to retain the same after her death, subject to the further order of the Surrogate's Court; and next, to distribute the one-third given to Thomas Gill, and the other of the re-

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maining two-thirds, among the next of kin of the testator, it appearing that Thomas Gill and Ann Gill, legatees in said will named, both died before the testator.

On the 9th of July, 1858, a distribution was made under said decree, and all of the next of kin executed receipts in full for their respective shares.

Sarah Wilhelmina Anthony died on the 25th of June, 1864, leaving a last will and testament, which has been duly admitted to probate, of which her husband, Theophilus Anthony, is the sole acting executor, and to whom she gives all her property for life.

On the 19th of November, 1864, the Surrogate entered a decree, by which he directed said sum of $1,866.52 to be equally divided between Theophilus A. Gill and the children of the deceased brother, Thomas Gill..

From this decree, Theophilus Anthony, executor, appealed to the General Term of the Supreme Court, and the decree of the Surrogate was so far modified as to direct the payment of one-third of the sum of $1,866.52, remaining in the hands of the said Brouwer, as executor, to the said Theophilus Anthony, as executor of the last will and testament of Sarah Wilhelmina Anthony, deceased; one-third thereof to Theophilus A. Gill, and one-third thereof to the children of Thomas Gill, deceased, after first paying thereout the costs of the said Appellant, Theophilus Anthony, and the Respondent, Jacob Brouwer.

From this judgment the children of Thomas Gill have appealed.

By a careful attention to the facts in this case, which, owing to the various positions the parties occupy, are presented in a somewhat confused form, it will be seen that the only appeal before us is by the heirs of Thomas Gill, from the judgment of the Supreme Court, modifying the last decree of the Surrogate, and dismissing the appeal they attempted to take from the decree of the Surrogate made in July, 1858.

By that decree the executor was directed to retain one-third of the balance in his hands, and pay the interest thereof, during her life, to Sarah W. Anthony, the sister of the testator, in ac-

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cordance with the directions of the will; and of the remaining part, one-third was ordered to be paid to Theophilus A. Gill, a brother of the testator, one-third to Sarah W. Anthony, and one-third to the children of Thomas Gill, deceased.

This decree was final as to the subject-matter embraced within it, and disposed of the whole fund, except the portion retained during the life of Mrs. Anthony, and which only was subject to ultimate distribution after her death.

In this decree all parties concerned acquiesced, and all executed receipts for the shares to which, under its provisions, they were entitled.

This distribution was made expressly upon the theory, in which all parties concurred, that the entire estate had lapsed, except the life estate in one-third in favor of Mrs. Anthony. Even if there was a misapprehension of the law, yet as all parties were present, and assented to the conclusion and order of the Surrogate, and acted in affirmance of it, they should not be heard subsequently to question it; and especially after such a lapse of time, and after the funds had all been paid, and the executor, quoad hoc, had been discharged from his rtust.

It might perhaps be true that if an application had been, immediately after the making of this decree, made to the Surrogate, to open it for reconsideration, upon a suggestion that the law or the facts had been misunderstood, or misconstrued, he would have heard and acted upon this suggestion, and opened the decree for further consideration or correction. This, it has been held, he had power to do (Dobke *v.* McClaran, 41 Barb. 491; Brick's Estate, 15 Abb. 36). But this was not done. Even if it was competent, and as the point does not necessarily arise, it is not important for us to express any opinion upon this point at this time.

But, as we have seen, all parties acquiesced in this decree of July, 1858; the executor paid the sums ordered, and the account, with the exception of the money he was directed to retain, invest, and pay the income of, during Mrs. Anthony's life, was effectually closed. In June, 1864, Mrs. Anthony departed this life, and then the final accounting was had before

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the Surrogate, and he made the decree of November 19, 1864.

From this decree, in February, 1865, Theophilus Anthony, the husband of the deceased, Sarah W. Anthony, and who by her will was made the sole beneficiary of all her estate for life, brought his appeal to the Supreme Court, complaining that the Surrogate had committed an error, by depriving him, as the representative of his wife, of any share in the surplus remaining undisturbed. Immediately upon this, in March, 1865, the heirs of Thomas Gill brought their appeal, and then, for the first time, attempt to overhaul the decree of July 1858, and allege error in that decree, as well as in the decree of Novem- 1864.

This appeal was entirely too late, not only for the reason that, by their acts, they were estopped from questioning the decree, but because the statutory limitation of the right to appeal had gone by something more than six years. The appeal, therefore, so far as it sought to bring up for review the decree of July, 1858, was properly dismissed by the Supreme Court.

Upon the appeal of Theophilus Anthony, the Supreme Court corrected what they deemed to be an error in the decree of the Surrogate. He directed one-half of the entire fund, after the payment of certain expenses, to be paid to Theophilus A. Gill, the surviving brother of the testator, and the other half to the children of Thomas Gill, the Appellants here.

In this the Surrogate unquestionably erred. There is no intention expressed or implied in the will that the fund should be distributed to the heirs of Thomas Gill, to the exclusion of the testator's other brothers and sisters.

He had in one part of his will given one-third of his estate to Thomas, his heirs and assigns; and that portion they had received under the distribution in 1858. Then, after the life estate of Mrs. Anthony should determine, he directs the payment of the rest to Thomas Gill, without any words of succession or inheritance, adding, to make the intent more certain and specific, "It being my intention by this, my will, that after the said annuities shall cease to become due and payable, the said two-thirds, or remainder of my estate, shall go and be-

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long to my said brother, Thomas Gill, to the exclusion of all my other brothers and relations."

Without insisting that these children would come under the description of "relations," and would thus be literally and explicitly excluded from participation in this residuary fund, we think the Supreme Court rightly adjudged that the testator made the bequest in the evident expection that Thomas Gill would survive him, and intended to provide for that exigency, and that only.

There is no reference in that bequest to the children of Thomas, and not only no indication that it was intended they should take what had been designated as the portion of the father, but the strongest implications that the sole beneficiary was Thomas Gill, and upon his failure to take, that portion of his estate should remain undisposed of by the will.

The case comes precisely within the principle, and is governed by the rule recently adjudicated and applied by this Court in the case of Van Beuren *v.* Dash (30 N. Y. 393).

The principle which should have governed the final distribution being thus settled, the Supreme Court modified the decree of the Surrogate by directing that one-third of the fund should be paid to Theophilus Anthony, the executor and trustee of Sarah W. Anthony, one-third to Theophilus A. Gill, the surviving brother of the testator, and the balance to the children of Thomas Gill, in equal shares, after first paying thereout the costs of Anthony, and of Brouwer, the executor of James Gill.

The judgment was in all respects right, and should be affirmed, with the costs of the Respondents, Anthony and Brouwer, on this appeal, to be paid by the Appellants, the children of Thomas Gill.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE OF THE STATE OF NEW YORK v. LANSING AND OTHERS.

Execution—Satisfaction.

CLERKE, J.—Upon the failure of the bank of Oliver Lee and Co., James M. Smith was appointed receiver of its property and effects, about September, 1857, and afterward, as such receiver, commenced an action in the Supreme Court against Henry L. Lansing, president of the bank, to compel him to convey real estate belonging to it, which he had procured to be conveyed to him, and which he claimed to hold to secure himself, Dean Richmond, and others, against the liabilities which he and they had incurred as sureties for the bank. In August, 1859, a judgment was obtained in that action, directing Lansing to make the conveyance. This judgment was, upon appeal, reversed by the General Term; and upon appeal to the Court of Appeals, the judgment of the General Term was reversed, and that of the Special Term affirmed. A notice of lis pendens in this action was filed in the office of the Clerk of Erie County, on the 8th day of April, 1858. At the time the Plaintiffs bid off the premises at the Sheriff's sale, under the execution in the action which they had brought, they had actual notice of the pendency of the action brought by the receiver, of the judgments which had been rendered thereon, and of the appeal then pending in the Court of Appeals. The judgment obtained by the Plaintiffs against Lansing and others, under which the execution to which I have referred was issued, was recovered on the 14th of January, 1860, for the sum of $20,714.87. This judgment duly docketed in the county of Albany, and a transcript thereof, was duly filed and docketed on the 16th of January, 1860, in the county of Erie. The Sheriff of Erie, after due notice, under the execution issued in this judgment, sold the real estate which the Supreme Court, in the action brought by the receiver, had adjudged should be conveyed by Lansing to him.

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Subsequently to the decision of the Court of Appeals, the said real estate was sold by a referee on the 2nd of July, 1862, under direction of the Superior Court, for the sum of $13,187 over and above the expenses of the sale. After the sale and on the 18th of September, 1862, the Defendants in this action presented a petition to the Superior Court, asking for a distribution of the proceeds of the sale; and the Court granted an order requiring the receiver, the treasurer of the Plaintiffs, and others, to show cause why the distribution should not be made. Upon proof of service of the order, the Court, on the 26th of September, 1862, directed the distribution, and Richmond received $10,493.09, Lansing $1,049.48, and the Plaintiffs' treasurer $1,644.43. For the recovery of this money paid to Richmond and Lansing, this action was brought. On these facts, the decision of the referee was correct.

The execution, issued upon the judgment in favor of the Plaintiffs against Lansing and others, was returned satisfied, and remains on record in full force. It cannot be vacated or impeached in any proceeding or action of this kind. No attempt has been made by the Plaintiffs either to vacate the return to the execution which was returned satisfied, or to appeal from the Superior Court, or to set aside the proceedings therein as fraudulent or irregular; and they have received, without protest, the money awarded to them under these proceedings.

The judgment should be affirmed, with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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SLOAN & SCHWARTZ v. VAN WYCK.

Conflict of Evidence—Submission to Jury.

Where there is a conflict of evidence on an essential point, the case is properly submitted to the jury.

CLERKE, J.—The only question in this case is, was there conflicting evidence to go to the jury on the point alleging that the Plaintiffs took back the machine in discharge of the indebtedness of Van Wyck, incurred in the purchase of it. This Court decided, when the case was last here, that there was no conflicting evidence on this point; that from the Plaintiffs' own evidence, it was clear that they took back the machine in discharge of that indebtedness. Schwartz testifies that Van Wyck told him that Wood, the owner of the premises occupied by the Defendant, claimed to have a lien on the machine; that it would be sold for rent, and that the Plaintiffs had better take it away. Van Wyck told him to sell it. This would not be sufficient to exonerate the Defendant from liability for a deficiency on the sale, if there should be a deficiency. But the Defendant testifies that he never directed Schwartz to sell it. There was a conflict on what I consider an essential point. For, if the Plaintiffs resumed possession of the machine without any such direction from the Defendant, and without any qualification, the legal conclusion would be, as Judge Wright mentioned in his opinion—to wit, that the sale was rescinded.

Van Wyck testifies that when he spoke to Schwarz about taking the machine away, he told him he must not trouble him (Van Wyck) any further about it, and that Schwartz said he would be satisfied to do so. Sloan, the other Plaintiff, who was present on the occasion referred to, swears that Van Wyck did not say that they were not to trouble him again. Schwartz corrobarated Sloan. I think in all this there was a plain con-

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flict of evidence on an essential point—the release of the Defendant's liability by the redelivery of the machine to the Plaintiffs. Was this redelivery for the purpose of satisfying the debt due to the Plaintiff, or was it merely for the purpose of selling it on an account, and applying the proceeds to its payment? This was fairly put to the jury.

I have assumed throughout that the Defendant was liable as purchaser of the machine, and that his substitution in the place of Hall & Green was tantamount to an original promise. This point is disposed of in Judge Wright's opinion. This Court reversed the judgment, and ordered a new trial, solely on the ground that there was not a particle of evidence to show that the machine was taken by the Plaintiffs, on the order of the Defendant, to enable them to sell it, and apply the fruits of the sale toward the discharge of the debt.

The judgment should be affirmed with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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WATERMAN L. ORMSBY, APPELLANT, *v.* BENJAMIN DOUGLASS, RESPONDENT.

Slander—Privileged Communications—Evidence—Malice.

In an action for slander, if it appear that the Defendant had just occasion for speaking the alleged slanderous words, malice is not to be presumed; a communication which would otherwise be slanderous, is privileged, if made in good faith, in respect to a matter involving the duty of the party making it.

This principle applies to an agent employed to procure information respecting the solvency, credit, or standing of another, and who communicates confidentially and in good faith to his principal the result of his investigations.

One who makes the procurement of such information an occupation, and receives a compensation therefor, is within the rule.

APPEAL from Superior Court of New York city. The action was brought to recover damages for slander, and was tried before Justice Pierrepont and a jury in March, 1858. It appeared upon the trial that the Defendant kept a mercantile agency in New York city, the business of which was to obtain information as to the credit and responsibility of persons in business, and to furnish it to those who had occasion to use it. By the terms of the subscription all information was considered strictly confidential, furnished only for the use of subscribers, and not to be communicated to any other person. In July or August, 1854, one Benton, a subscriber, who held a note endorsed by the Plaintiff, presented a written call for information as to the credit, responsibility, &c., of the Plaintiff. The book was examined by the clerk, and after consulting Defendant, and some objection by Defendant to reporting in writing (because the report was bad), and a further conversation with

Libel—Privileged Communications. 46 *N. Y.* 192; 2 *Hun,* 353 (4 *T. & C.* 580); 35 *Hun,* 585; 39 *Hun,* 208; 51 *Hun,* 475 (21 *St. Rep.* 652; 4 *N. Y. Supp.* 378); 71 *Hun,* 488 (54 *St. Rep.* 905; 24 *N. Y. Supp.* 1062); 48 *How. Pr.* 124; 55 *How. Pr.* 56; 30 *Misc.* 712 (63 *N. Y. Supp.* 306); 13 *St. Rep.* 213.

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the witness, the Defendant stated that Ormsby was a man of no responsibility; he was a bad man, and worked for counterfeiters, and was a counterfeiter. Afterwards, in another conversation, after Plaintiff's attorney had written a letter to the Defendant, the witness asked Defendant if he had made further inquiries, and the result; and he said he had, and that the report was not so much out of the way after all. He also stated that he had given the report to some four or five other persons. The Plaintiff offered some evidence, which was objected to and excluded; and Defendant introduced some testimony, which was objected to and received, and exceptions taken. The points taken in this respect appear in the opinion. At the close of the Plaintiff's evidence, the Defendant moved for a nonsuit and a dismissal of the complaint, on the ground that the words spoken by the Defendant, concerning the Plaintiff, appeared to have been spoken confidentially, in the course of the Defendant's employment, to one of his employers, on the application of the latter, who had need of the information for the purpose of governing his discretion in his business, and that under the circumstances the communication was not unlawful, there being no evidence of malice or bad faith.

The Court granted the motion, to which the Plaintiff's counsel excepted. The exceptions were ordered to be heard at General Term, and judgment was suspended. A new trial was denied, and the Plaintiff appealed to the Court of Appeals.

Philip G. Galpin for Appellant.
William Fullerton for Respondent.

MILLER, J.—While the law authorizes actions of slander to be maintained to vindicate the reputation and character of individuals who have been wrongfully and unjustly assailed, it also upholds the principle that, in a certain class of cases, communications between individuals are regarded as privileged, and are therefore protected from the presumption of malice, which is usually to be inferred from the charge itself. Where the wrongful act is intentional, a malicious intent is implied,

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and the party is held responsible. But in actions of slander, if it be made to appear that the Defendant had just occasion to speak the words, then malice is not to be presumed, and some additional evidence is necessary to establish the charge. The rule is well settled, that a communication which would otherwise be slanderous and actionable, is privileged if made in good faith upon a matter involving an interest or duty of the party making it; though such duty be not strictly legal, but of imperfect obligation to a person having a corresponding interest or duty (Van Wyck *v.* Aspinwall, 17 N. Y. 190; Harrison *v.* Bush, 32 Eng. L. & Eq. 173). And this principle applies to an agent employed to procure information as to the solvency, credit, and standing of another, who communicates, confidentially and in good faith, the information obtained to his principal, who had an interest in the subject-matter (Washburn *v.* Cooke, 3 Den. 110).

Within the rule laid down, the slanderous words for which the Plaintiff seeks to recover damages in this action were clearly privileged; and the Judge, upon the trial, committed no error in nonsuiting the Plaintiff. They were communicated by the Defendant in the performance of a duty imposed upon him to a person who had an interest in the matter, and who had a right to require the information.

The communication was in response to an inquiry as to the responsibility and standing of the Plaintiff, and embraced information relating to that subject. The witness had a note in his possession at the time, endorsed by the Plaintiff; and there would appear to have been some necessity for making the inquiry, and some reason presented to the Defendant from which he might well infer that there was occasion for the party to obtain the information he desired. So long as the Defendant acted in good faith, in reporting facts which came to his knowledge which had any bearing upon the subject of inquiry, even although the report may have contained criminatory matter which otherwise would have been slanderous and actionable, he was justified and excusable. The communication made

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being primâ facie privileged, as is apparent, the presumption of malice is repelled, and the onus of proving malice is upon the Plaintiff. The privileged character of the communication relieves the party from the malicious intent which is usually to be presumed from the act itself, and the action is to be regarded as governed by the same rule as an action for malicious prosecution.

The presumption of malice being rebutted, the Plaintiff must establish malice affirmatively on the part of the Defendant, in uttering the alleged slanderous words. He must show that Defendant was influenced by some other motive than the mere discharge of a duty, and that the communication was not made solely for privileged purposes (Howard *v.* Thompson, 21 Wend. 319, 320; Somervill *v.* Hawkins, 3 E. L. & Eq. R. 506, 507; Taylor *v.* Hawkins, 5 id. 253, 256, 257; Harris *v.* Thompson, 24 id. 370, 380, 381; 32 id. 176; 3 Denio, 113; 17 N. Y. 193).

It is said that the Defendant falsely charged the Plaintiff with a crime, and that the answer of the Defendant to the inquiry made was not responsive to the question put. It is true that the report made embraced a charge of a criminal offence; but it was I think, directly responsive to the question asked. It related to the standing of the party. It affected his responsibility as a business man, and his financial credit and character. It had much to do with the question whether, as a business man, he was entitled to credit and confidence, and to what extent. It was, in fact, what the witness inquired for, and had a direct bearing upon the inquiry made, which embraced information as to the Plaintiff.

It was not an allegation or charge made by the Defendant, but a report of information he had obtained in the due course of his business, and which had been entered upon his books. He merely communicated it to a person who had a right to demand such information, and he had included a fact within the range of the inquiry made. Surely, if any communication of this kind, made in good faith, is privileged, then the whole is pro-

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tected as much as any part of it; and it cannot well be urged that there is malice because the whole truth is told, and a portion of it is criminatory. Nor is there any evidence that the communication made to the witness, produced by the Plaintiff, was repeated by the Defendant in a form or under circumstances which constitute malice, or that it was uttered to others with any malicious intent. If the alleged slanderous words were communicated to other persons besides the witness, the surrounding circumstances evince that it was done in good faith, and confidentially, to those who had a right to require it, and where it would be protected as a privileged communication. While defamatory words are not shielded from punishment when published with a malicious intent, there was nothing in the conduct of the Defendant, or in the manner in which he performed the delicate and responsible duty which devolved upon him, affecting as it did the credit, responsibility, and character of the Plaintiff, which evidenced malice. He refused to give a written report, was extremely careful and cautious, and with considerable apparent reluctance and hesitation he imparted the information which he possessed as to the Plaintiff—thus rebutting the idea that any evil intent existed, and showing quite clearly that he acted in good faith. The business in which the Defendant was engaged is sanctioned by the usuages of commercial communities, and the proof in this case fails to establish that he transgressed any rule of law in its transaction.

The offer to prove efforts on the part of the Defendant to procure testimony as to the truth of the slanderous words, does not appear to have been distinctly ruled upon by the Court, nor were any exceptions taken in regard to it; and therefore it is unimportant. The terms of subscription signed by the witness were competent testimony to prove the relationship existing between him and the Defendant, and the privileged character of the communication.

No other questions are made which call for remarks, and the judgment should be affirmed.

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WOODRUFF, J.—The evidence of the terms of the contract between the Defendant and the witness Benton, to whom the alleged slanderous words were utttered, were properly received in evidence, as contained in Exhibit A.

1st. It tended to show the relation between the Defendant and the person to whom the words were spoken, and to raise the legal question whether the communication was privileged.

In that sense it is to be regarded as part of the res gestæ.

2d. It had a direct bearing on the question of malice. It was of precisely the same nature as the testimony which was rejected on the trial of Taylor *v.* Church, and the rejection of which was held in this Court to entitle the Defendant to a reversal of the judgment and a new trial (8 N. Y. R. 452).

3d. It was not erroneous to reject the Plaintiff's offer "to show efforts on the part of Defendant to procure testimony as to the truth of the slanderous words." This general offer did not propose to prove any misconduct of the Defendant which could be revelant as an aggravation of damages, or as showing malice.

A Defendant sued or complained of for alleged slander, has an unqualified right to procure testimony, and, of course, to "make efforts" to procure testimony, bearing on the inquiry whether the words are true or not; to be used, if necessary, for defence or mitigation, as the case may be.

The rule often stated—that alleging the truth in the answer, and failing to prove it, aggravates the wrong—does not make such an offer admissible. On the contrary, the existence of such a rule would furnish a reason in itself why a Defendant, before alleging the truth of the words spoken, should satisfy himself on the very question whether he can prove it or not; and if he had alleged it in his answer, he certainly may lawfully make efforts to procure testimony "as to its truth."

It would be strange if a party complained of could not, in a proper manner, endeavor to procure testimony, which, if found, might avail for his protection.

If the Defendant in those efforts did any act which showed

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that his motives were malicious, or which ought to be regarded as aggravating the alleged wrong, a different question would be suggested. If such acts were admissible, they were not proposed to be proved on this occasion.

The offer should have pointed to acts which the Court could see were wrongful. Here, all that was proposed to be proved was, so far as the Court could see, lawful and proper.

The remaining question goes to the merits of the Plaintiff's case. Was the complaint properly dismissed, or had the Plaintiff proved a cause of action?

This depended upon two questions:

1st. Was the communication made to Benton privileged?

2d. Did the Plaintiff give any proof which would warrant a finding that the words were spoken maliciously?

It is a general rule that confidential communications respecting the character of another, made to one who is interested in the communication, and desires the information as a guide to himself in the conduct of his own affairs and dealings with such other, are privileged, and not actionable, unless there be proof of malice (1 Starkie on Slander, 321; Bradley *v.* Heath, 12 Pick. 163, and cases cited; 3 B. & P. 587; 9 B. & C. 403).

On the other hand, if the occasion is used as a mere pretext or cloak under which maliciously to utter false assertions with intent to injure, the occasion will not justify the speaking (Weatherston *v.* Hawkins, 1 T. R. 110).

And it is well settled that when the occasion be one which makes the communication primâ facie privileged proof that it was false is not enough to create a presumption of malice (Fowles *v.* Bowen, 30 N. Y. 20, &c.).

Communications respecting the character of a servant made to one who contemplates giving him employment, and desires and has a right to information on the subject, are privileged (Carroll *v.* Bird, 3 Esp. 201; Burr. 2425; Hodgson *v.* Scarlett, 1 B. & Ald. 240).

And the rule is settled even more broadly, that a publication warranted by an occasion apparently beneficial and honest, is

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not actionable without express malice; as, for example, a communication in time of war with France to the officers of a volunteer corps in England, that the sergeant, who was a Frenchman, had been the executioner of the king of France, and other words showing his sympathy with the public enemy, was held privileged.

So a communication by a party interested, to those interested with him, respecting the conduct of a solicitor in the management of their concerns (McDougall *v.* Claridge, 1 Camp. 267).

And it is enough that the person *to whom* the communication is made is interested; as when a communication was made to the Bishop of Durham respecting the steward of his estate (Cleaver *v.* Sarraude, cited in 1 Camp. 268).

And to come more nearly to the case before us, a communication made to one who had become surety for the purchases of the Plaintiff (Dunman *v.* Bigg, 1 Camp. R. 269).

Upon the same general principle, merchants have an interest in knowing, and have a right to know, the character of their dealers, and of those who propose to deal with them, and of those upon whose standing and responsibility they, in the course of their business, have occasion to rely.

As a necessary consequence, they may make inquiries of other merchants, or of any person who may have information; and if such merchant or other person in good faith communicates the information which he has, or thinks he has, the communication is privileged.

These principles are not new nor unfamiliar, but have often been recognized in this State. The cases of Taylor *v.* Church (8 N. Y. 452; 1 E. D. Smith, 283); and Fowles *v.* Bowen (30 N. Y. 20), and the cases cited therein, show the recognition of the rule.

Laying out of view for the moment the circumstances that the Defendant in this case made it his business to seek information, in order to furnish it to those whose occasions and interest required knowledge of the standing and character of others who dealt or proposed to deal with them, it is clear that if the

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witness Benton, having procured a note to be discounted on the faith, in part, of the Plaintiff's responsibility, or being about to do so, called on the Defendant for information respecting his standing and responsibility, it was entirely lawful for the Defendant to give him all the information which he had on the subject. It was in a just sense a duty which one member of the community owes to another for mutual protection and benefit, and the law will recognize it as such by holding it privileged.

Information of the description referred to being important, there is no legal objection to the employment of an agent to seek and communicate it.

And the agent may properly be paid for his time, labor, and expense in the pursuit of such information.

If one merchant may employ his own private agent to seek and communicate such information (3 Denio, 110), there is no legal objection to the combination or union of two or more in the employment of the same agent.

And as a consequence, if an agent may act for several, he may make the pursuit of such information his occupation, and receive from those who desire to avail themselves of his services and his knowledge acquired in such occupation, a compensation therefor.

In short, the inquiry is not, How did the Defendant acquire the information? nor whether he received compensation for the information he had gained; but, Was the occasion one which justified him in giving such information as he possessed of the Appellant?

It is observed by Ingraham, J., in Taylor v. Church (1 E. D. Smith, 283), in speaking of a business such as that in which the Defendant is engaged, and which is called a mercantile agency: "Such establishments, properly conducted, and giving only correct information, are of the highest importance, not only to the parties immediately concerned, but to the mercantile community." In my opinion, the right of the Plaintiff to recover does not at all depend on the question whether the De-

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fendant was pursuing this business for gain, but on the same principles as if he had been in the same business with the witness, who applied to him, and had made the same communication.

There was not the slightest evidence of malice; on the contrary, the Defendant took precaution (by declining to answer in writing) to prevent his communication passing to the knowledge of any but the applicant himself.

The proof that he had "given out" the same information to others, was not material. That was not the slander for which the action was brought, and it did not tend to prove that he was actuated by malice in giving the information to the witness.

Indeed, in the connection in which the statement of the Defendant—that he had given it out to some others—was made, it simply warranted the inference that other applicants, similarly situated, had received the same information. If so, the Defendant acted in those instances as in this, in mere discharge of his duty to his employers.

The animadversions of the counsel for the Appellant are eminently just when applied to any who, in the hope of gain, for their own emolument, in bad fatith, make traffic of the good name and reputation of others. But I cannot concede that in the large population of a crowded city, and in a mercantile community where false representations, fraud, dishonesty, and insolvency are easily concealed, and but imperfectly known, or known to but few when detected—where it is easy for strangers to practice upon the unwary or unsuspecting —a business is to be characterized as unworthy which aims only to give correct information to those whose interests entitle them to seek it wherever it may be had.

The judgment should be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

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CHRISTIAN F. HOLTZ, RESPONDENT, v. JOHN A. BOPPE, APPELLANT.

Promissory Note—Liability of Endorser—Presentation to Maker—Diligence.

The rule that requires a demand of payment of a note to be made personally upon the maker thereof, or at his residence or place of business, when no place of payment is specified in the note itself, is satisfied if due and reasonable diligence is exercised in ascertaining the place of residence or of business of the maker, though without success.

Chas. N. Black for Appellant.
Samuel J. Glassey for Respondent.

BACON, J.—The only question presented by this case is, whether the Defendant was properly charged, as endorser of the note in suit, by a due presentment and demand of payment of the same of the makers. The note was made by Hartman & Ilch, who were partners in business, and was payable six months after date, but specifying no place of payment. The demand of payment was consequently required to be made of the makers personally, or at their dwelling-place, or place of business. On the subject of the demand, the Referee finds the following facts (we assume the facts as settled by the report, and do not look out of it to ascertain whether any other state of facts existed than such as are found by the referee): Prior to the 26th of October, 1860, the makers resided and carried on business at Nos. 622 and 624 Broadway, in the city of New York; and on or about that day they hired the basement of the building at the corner of Bowery and Division street, in said city, for the purpose of carrying on business there, removed a portion of their furniture and property to that place, and occupied

Promissory note—Demand on maker—Place of. 60 *N. Y.* 522.

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it for about a month, and partially fitted up the premises for their business. Before the 3d of November, on which day the note fell due, they informed the Plaintiff they were about to remove to the said basement, and they were seen there by the Plaintiff before that day.

A few days only before the note fell due, both the makers changed their previous residences, one of them removing twice between the 23d of October and the 5th of November. The Plaintiff lived in Hoboken, New Jersey, and did not appear to have had any knowledge of their changes of residence, nor did it appear that he was apprised of anything but the fact communicated to him by the makers, in the presence of the Defendant, that they had removed their place of business to the basement aforesaid.

The person who made the demand having received instructions to that effect, went with the note, on the day it fell due, to the basement on the corner of Bowery and Division street, and found it closed, and no person therein. He then make inquiry in the vicinity for the makers, but was unable to find them, or either of them. From there he went immediately to Nos. 622 and 624 Broadway, where the sign of the firm was still up, and made inquiry there, and in the vicinity, but could not find them, or either of them, or any one present to answer for them, or obtain any information in respect to their residence.

He then protested the note, stating that after diligent search he was unable to find the makers, and sent due notice to the Defendant, by mail, at his place of residence. On these facts the referee found, as a conclusion of law, that the note was duly presented for payment, and notice given, and judgment was rendered therefor against the Defendant, for the amount of the note and interest.

Assuming these facts, as we do, from the findings of the referee, I think his conclusions were entirely right. The rule that requires a demand in such a case to be made personally, or at the residence or place of business of the makers, is satis-

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fied if due and reasonable diligence is used to ascertain such residence or place of business. In this case, such diligence seems to me to have been employed. The makers of the note, by their own statement to the holder of the note, located themselves at the basement designated by them; they, in fact, vacated the premises theretofore occupied by them, and were, on the 3d of November, so far as they were engaged in business at all, in the occupation of the basement on the corner of Bowery and Division street. In addition to a demand at this place, the notary also called at the former place of business and residence of the makers; and at both places, and in the vicinity of each, made inquiries for the parties, from which he could derive no information as to the whereabouts of either of them. I do not well see what greater diligence he could have employed. A search in the Directory would have been of no avail, since the change of residence had been so recent that it would have afforded no aid; and if the inquiries and searches had been limited to the Directory, it would clearly have been insufficient. I am unable to perceive any track of inquiry or investigation that could have been pursued that would have been rewarded by a discovery of the actual residence of these parties, and am of the opinion that all the diligence the case called for, or the law exacted, was employed by the notary in making the demand of payment.

The judgment should be affirmed.

All concur, except, MASON, J.

Affirmed.

JOEL TIFFANY,
State Reporter.

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CHARLES L. BEACH AND OTHERS, RESPONDENTS *v.* THE RARITAN & DELAWARE BAY RAILROAD CO., IMPLEADED WITH WM. H. MELLEN, APPELLANTS.

Contract—Telegram—Parol Evidence.

Where parties have met and negotiated in respect to the letting of a barge for the term of six months, and have agreed upon all the terms except as to the *price* to be paid for its use, and have parted with the understanding that the conclusion of a party as to accepting the price proposed is to be communicated by telegraph, such previous negotiations may be inquired into to explain the extent and limitation of the telegram.

Such telegram is not to be deemed a reducing of the contract between the parties to writing, and as such incapable of explanation by an inquiry into the preliminary negotiation.

APPEAL from judgment upon a verdict for the Plaintiffs, affirmed by the Supreme Court, in General Term of the Third District.

The Plaintiffs being owners in possession of the barge called the "Globe," let it to the Defendant Mellen on the 19th of March, 1860, until the first of October thereafter, for the price or "rent" of $400.

On or about the 5th of September, the Appellants, the railroad company, without the knowledge or consent of the Plaintiffs, and according to Appellants' evidence, on the representation and in the belief that Mellen was owner, hired the barge from Mellen, at $5 per day, for the purpose of transporting railroad iron therein from the ship America, then in the port of New York, to Port Monmouth, in New Jersey; and on the 5th or 6th of September she was taken from the slip and placed alongside of the ship America, and the loading with iron was

Evidence—Parol—Complete Contract. 7 *Misc.* 315 (57 *St. Rep.* 554; 27 *N. Y. Supp.* 904).

Evidence—Relevancy—Prices. 76 *N. Y.* 124; 90 *N. Y.* 11; 135 *N. Y.* 199 (48 *St. Rep.* 85); 24 *Hun,* 373; 15 *Misc.* 147 (71 *St. Rep.* 456; 36 *N. Y. Supp.* 469); 48 *St. Rep.* 85.

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begun. After receiving 200 tons or upward she was found to be sinking, when she was moved into or near to a slip at the foot of Spring street, where she sunk in about five feet of water, at low tide.

While in this condition, and with the iron still on board, and on or about the 2d of October, the Plaintiffs demanded the barge from Melen "in as good condition as she was when delivered."

His answer was, "that he could not deliver her," and in the same conversation stated that "the barge was sunk."

On the same day the Plaintiffs demanded the barge from the Appellants (the railroad company) at their office in New York, and received for answer from the director and agent in charge, and by whom she was hired from Mellen—according to the testimony of one of the Plaintiffs' witnesses—that "she was sunk, and he could not deliver her."

He acknowledged that the company had her. He said it was impossible to deliver her. He said he had hired her from Mellen, and he supposed Mellen was the owner of her. The same director being called and examined by the Plaintiffs, testified, on cross-examination, to his belief that Mellen was owner when he hired her, and that Mellen spoke of her as "my barge," and that when the agent of the Plaintiffs made the demand of him "he disclaimed all knowledge of them or accountibility to them;" and he further testified that "we had no control of her in October; had no possession of her when demand was made."

It also appeared on the trial, that prior to the hiring for the transportation of the iron, Mellen had suffered the barge to be employed by the Appellants for transportation from New York to some place in New Jersey; and that, in July or August, the Plaintiffs having heard she was employed in carrying railroad cars, saw Mellen, and objected to such use of the barge, insisting that she should only be used in the slip as a receiving or store barge.

The Appellants removed a portion of the iron from the barge

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in or prior to December. Mellen testified that the railroad company refused to raise the barge, and he (Mellen), in obedience to the requirement of the "city officers," raised her the latter part of December, and that there was then between forty or fifty tons of iron on board.

The action was commenced on or about the 2d of October, alleging the facts above recited, characterizing the conduct of the Defendants as a conversion, and claiming damages $6,000.

No evidence was given of any return, or offer to return, the barge after she was raised. The answers of the Defendants put in issue the material grounds on which they are sought to be charged.

The principal questions of fact touching the legal liability of the Defendants, contested on the trial, were: First—Whether the letting of the barge to Mellen was for a special and restricted use only, viz., employment as a receiving or store barge in his slip? or for such general use as was suitable for a barge? as Mellen, in his testimony, states, "In hiring the barge there was no restriction about it; as I understood it I was to use her as mine had been; I had used mine to carry goods."

On this point the Plaintiffs and Mellen are in direct conflict in their testimony.

Second—Whether the sinking of the barge was owing to negligence of Mellen in his care of the barge, by omission to keep her properly caulked, and hiring her to the Appellants in an unsuitable or unseaworthy condition for use in transporting goods or iron?

Third—Whether the sinking of the barge was owing to the improper, negligent, or unskillful manner in which the iron was placed on board of the barge? it being claimed by the Plaintiffs, and also testified by Mellen, that the loading was not by distributing the iron equally, "so as to preserve an even keel," but by placing too much aft, while there was little in the centre or forward, she was strained, her seams opened, so that

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leaking ensued, and she was sunk; all of which was denied by the Appellants, who imput the sinking to the unseaworthiness of the barge when hired.

On the first point evidence was given of oral negotiations with the Plaintiffs, at Catskill, where they resided, out of which the Plaintiffs claim that the restrictions upon the use of the barge arose.

The Plaintiffs' final assent to the letting was communicated to Mellen at New York, by telegram.

These Plaintiffs testified that Mellen, on the 17th March, called and stated "that his barge, which had been used as a store or receiving barge, had been burnt, and he wished to hire the Globe for that purpose; that he wanted her only for a receiving or store barge."

He asked their price. Plaintiffs conferred apart, and they proposed $500 till the 1st of November. He declined to give that, but offered $400.

Plaintiffs told him they would talk further, and telegraph to him to New York if they would consent to a reduction of price.

Another of the Plaintiffs states the interview thus: "Mellen applied for the lease of the barge; we inquired of him the use or purpose for which it was wanted; he said she was to be used as a receiving or storing barge, at New York, at slip first below ours, at New York city; price was fixed at $400; $500 was price named, and November 1, 1860, the time; we told him we would not consent to lease the barge after 1st October; he objected to the $500; I don't recollect his making an offer; this was on Saturday; owners met on Monday to determine; on Saturday we agreed to reply our final conclusion by telegraph; the use was settled on Saturday; we were to communicate the price on Monday; we came to conclusion on Monday."

On Monday a dispatch to Mellen was sent by the Plaintiffs by telegraph, as follows:

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"You may have barge Globe for $400 until October 1. Rent payable, ½ 1st July, and ½ 1st October.

"PENFIELD, DAY & CO.

"March 19th, 1860."

Without further negotiations Mellen took possession of the barge.

It was insisted on the trial that this dispatch is to be regarded as a written instrument defining the terms of the letting, and that all testimony to oral arrangements restricting Mellen to the use of the barge as a receiving or storing barge, was incompetent. To the ruling adverse to this claim the Appellants excepted.

Some other exceptions to the admission were taken on the trial by the Appellants, which are noticed in the opinion.

Various exceptions were also taken by the Appellants to the charge to the jury.

The evidence as to the value of the barge was conflicting, and the jury found such value as damages in the verdict which they rendered for the Plaintiffs against both of the Defendants, for $3,210, for which, with costs, judgment was rendered. After affirmance thereof in General Term, the Defendant, the railroad company ,appealed to this Court.

WOODRUFF, J.—The Defendants, by objections to evidence, and by request for instructions to the jury, insisted that the telegram sent by the Plaintiffs at Catskill, on Monday, the 19th of March, 1860, to Mellen (the lessee of the barge) in New York, is to be taken as the only legal evidence of the contract for the barge made with the Plaintiffs, and that therefore all proof of the oral negotiations or agreement made by Mellen with the Plaintiffs at Catskill, on the Saturday previous—March 17th—was inadmissible, and should be disregarded.

This claim is important, because if the use in which Mellen was permitted by the terms of the letting to employ the barge was limited to an employment thereof in the slip as a receiving or storing barge, it was so limited by the oral treaty of Satur-

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day, the telegram being entirely silent on that subject, and importing, if anything in relation to the use is to be inferred from it, that Mellen was at liberty to use her for any proper purpose for which vessels of that description are usually employed.

The rule of law invoked by the Appellants is, that where the contract of the parties is reduced to writing, all prior and contemporaneous oral negotiations or agreements are merged, and oral testimony is not admissible to either contradict, enlarge, or, if free from ambiguity, explain it.

To this rule both parties assent. Whether it is applicable to the present case, and operates to exclude the oral testimony, is the question in contest.

When and to what extent dispatches sent by parties to each other by telegraph are to be treated as written contracts, or written evidence of their contracts, must depend upon the circumstances in which they are sent, and the intent and object for which they are transmitted and received.

Treating them most favorably to the view urged by the Appellants, they can have no higher or more conclusive effect than a letter sent by mail, in the same terms, would have.

The first question then is, was this telegram, according to the intent and understanding of the parties *at the time* when it was sent and received, the expression of the contract of the Plaintiffs?

This question is always an open one in regard to communications between parties, whether oral or written. If there is doubt upon that question, it may properly be left to the jury, and it was left to them in the present case.

For the determination of *that* question, it is competent to show the circumstances under which, and the purpose for which, it was sent, though it may not be competent to show, by parol, that in regard to its unambiguous provisions, the parties did not intend to contract according to its tenor.

And it is certainly competent to show that it was sent for the mere purpose of fixing one of the details of a proposed

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agreement, upon which the minds of the parties had not before concurred.

For example, a telegram is sent in these terms: "You may have the horse for $25."

It seems a perversion of the rule referred to, to say that because such a dispatch, or such a communication by letter may, if unexplained, import a sale of the horse for $25, the owner may not show that the parties had previously met at a remote place and negotiated touching a hiring of the horse for six months, to be used as a coach-horse, and had parted with an understanding that a dispatch stating the price required should be sent to him.

Or suppose an oral application were made for the use of a horse, for four months, in light work before a pleasure-wagon, and the parties failed to agree upon the period or price of the service, but separated with an understanding that the mind of the owner upon these two particulars shall be communicated either in writing or by telegram. Thereafter a dispatch or writing is sent in these terms: "We consent that you have the horse for three months for $30."

These examples are probably no more illustrative of the subject than the case before us, as claimed by the Respondents; but I apprehend that in neither of them is it doubtful that the owner may show that the letter or dispatch was not sent or received as an expression of the whole contract, and to that end may prove that it was sent in answer to a previous either written or oral communication *made* to him, which should be read or taken with such reply in order that the whole contract may appear.

It would be a strange inconsistency if, where an entire negotiation is conducted by letter, the proposition of the one party may be read to determine the meaning of the acceptance by the other; but if such proposition be oral, and a written reply be, for convenience, asked, the reply must be taken to bind the writer, without any reference to the proposition, or any aid therefrom, in particulars where the reply is silent—or, in other

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words, if the reply closed the door to inquiry, provided, if construed alone, it would be capable of receiving a legal signification.

Mr. Greenleaf, in defining that written evidence of a contract (vol. 1, § 275) to which the rule before mentioned is applicable, states it is "not everything which is in writing, but that only which is of a documentary and more solemn nature, containing the terms of a contract between the parties, and *designed* to be the *repository* and *evidence of their final intentions.*"

In Jeffry *v.* Walton (1 Stark. R. 267), where a written memorandum stated the period of the hiring of a horse, and the compensation, Lord Ellenborough said: "The written agreement merely regulates the time of hiring, and the rate of payment, and I shall not allow any evidence to be given in contradiction of these terms; but I am of opinion that it is competent for the Plaintiff to give in evidence suppletory matter, as part of the agreement."

And in Potter *v.* Hopkins (25 Wend. 417), where the writing did not on its face purport to be a complete agreement, it was held, that though binding so far as was expressed in terms, parol evidence was competent to show the whole contract.

The distinct ground upon which I place my opinion is, that where a proposition on one side is submitted, whether verbal or written, calling for an answer based on such proposal, the answer, though in writing, need not necessarily recite all the terms and conditions embodied in the proposal.

It is to be read in connection with the proposal to which it is a reply, and the whole together constitutes the contract between the parties.

Such written reply is no doubt conclusive, so far as the terms are expressed, but no further.

In such case the reply is neither made or received, nor understood to be, the expression of the whole contract.

This is in entire harmony with the rule as stated by Denio, J., in Renard *v.* Sampson (12 N. Y. 566).

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For more full illustration let me suggest further examples—thus:

On the 31st of August, in an oral negotiation, A. proposes to B., "I wish to hire your barge now lying in New York, until the first of January, to transport light hemlock bark only; I to recaulk her thoroughly before she is used, and newly paint her throughout, and deliver her to you, at the end of the term, at your dock in Catskill. Send me word by telegraph whether I can have her, and at what price."

Various answers by telegraph may be stated. Thus:

"You can have my barge for $300;" or, "You can have my barge until the 1st of January for $300;" "The rent of my barge will be $300, payable half down, and half 1st December."

Now, in each such case the parties never intended that their agreement should be in writing, further or beyond (at most) what is expressed in the telegram; and to say, that because the first supposed answer might, in the absence of explanatory proof, legally import a sale of the barge for a round sum, the owner cannot therefore prove the previous verbal proposal to which it was a reply, is perverting a useful rule of evidence, and giving it an application for which it was never intended.

And if the owner in such case may show, by parol, that a letting, and not a sale, was intended, then he may also show all the terms of the letting, and the like reasoning must admit all the terms of the letting in each of the other cases, and upon the principle that the parties have not intended or attempted to put their agreement in writing.

There was therefore no error in receiving evidence of the oral proposition made by Mellen to the Plaintiffs at Catskill, to which the telegram was a reply; and the restrictions as to the use of the barge imported by such proposition, if any there were, formed a part of the contract between the parties.

But I think the Judge fell into an error in his instruction to the jury respecting the legal liability of the Appellants, by which the jury may have been misled.

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He submitted to the jury the question, whether, by the contract of letting to Mellen, he was restricted to the use of the barge as a mere receiving or storing vessel; and he made the nature and conditions of the Defendant's liability depend in some degree upon the answer to that question.

As the verdict of the jury was general, we must deal with the Appellants' exceptions upon the assumption that the jury *may* have found that Mellen hired the barge to the 1st day of October, without any condition or restriction as to the use to which she might be devoted, and that he therefore had a right to employ her, or permit others to employ her, in a suitable and proper manner, in any business for which like barges are usually employed; or, at least, that he had a right to employ her in the same manner as he had employed another barge which had been burned.

In reference to this the jury were instructed: "If the latter was the contract, then the Defendants are not responsible in this action, unless the property has been lost or injured through the want of proper care on the part of the Defendants."

This was clearly upon the principle afterward stated in another connection. "A bailee is not responsible for loss, unless it happens through negligence or want of care."

The charge further imported that if (being unrestricted as to the use) the sinking of the barge was without the fault of either Mellen or the Appellants, and she was in such condition at the time when she was demanded that she could not be delivered by the Appellants, without any fault or negligence on their part, the Appellants are not liable.

These terms are not, it is true, explicitly stated, but the converse is more than once propounded to the jury, as a test of liability.

And the proposition I have thus stated is unquestionably correct. The hirer of a ship from a lessee for a proper purpose is not bound to restore her on demand, if she be lost without his fault or neglect, while in his lawful possession.

The Judge further charged that, even though the barge was

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let to Mellen for a special restricted use, and the Defendant Mellen, when he let the barge to the Appellants for the transportation of iron, violated the terms of his lease, still, if that was not known to the Appellants, and they supposed Mellen had a right to lease it in the manner he did, such hiring and taking possession under it would not of itself alone render the Appellants liable for the conversion of the barge. But if loss accrued through *their fault,* or if through *their negligence* they were not in a condition to deliver, and under such circumstances upon demand refused or omitted to deliver, they (the railroad company) were liable.

The result of these instructions was—if the use was not restricted by the contract, neither Defendant is liable, unless the loss was through the want of proper care on the part of the Defendants. If the use was restricted, the Appellants, if ignorant thereof, are not liable, unless the loss accrued through their fault or negligence.

And if, when demand was made of the railroad company, the barge was sunk in such condition that she could not be delivered, but without any fault or negligence of theirs, they are not liable.

Of these instructions the Appellants make no complaint. But the Judge "further charge, that if the loss occurred in consequence of negligence of either the railroad company or Mellen, and there was a refusal to deliver after demand made of both parties, subsequent to the expiration of the bailment, the railroad company were responsible."

I am not able to reconcile this instruction with the principles governing the charge in its other parts, nor with the rules which determine the liability of the railroad company under a state of facts which the jury may have found, and which were distinctly left to them upon conflicting evidence.

Thus, the jury were, by the submission, left at liberty to find, and we cannot say that they did not find, that the barge was let to Mellen without any restriction or condition restraining

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him or the railroad company from employing her for the transportation of iron.

They were told that, in such case, the Defendants were not responsible, unless she was lost through the want of proper care on the part of the Defendants.

They were left at liberty to find, and may have found, that "the loss occurred in consequence of negligence of Mellen" solely.

And yet, though all this was found, they are told that the railroad company is responsible, notwithstanding, provided "there was a refusal to deliver after demand made of both parties, subsequent to the expiration of the bailment."

This last instruction cannot be sustained, unless one of two propositions is sound, viz.: unless the railroad company is responsible for Mellen's negligence, or unless the railroad company was bound to deliver on demand made of them after the expiration of the bailment, although the barge was, without fault, sunken in the river, so that she could not then be delivered.

Neither of which propositions is sound, and neither of which is consistent with the general principles of the charge.

I think this last instruction was calculated to mislead the jury; although, if I were to pass upon this case, and determine the facts upon the preponderance of the evidence, I might conclude that it was reasonably clear that the use of the barge was restricted, and not less probable that the Appellants were guilty of negligence, both of which are largely assumed in the argument for the Respondents; that is not our province. These questions were left to the jury, and we cannot say that the instruction in question was immaterial, or could not have affected the verdict.

If the use of the barge was restricted, and she was put to a use not warranted by the terms of the letting, and by reason thereof she was lost, then Mellen was liable in damages for her value, whether he or the railroad company were negligent or not.

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And in such case, in my opinion, the railroad company is also liable for the value, independent of any question of negligence, for if by loading the barge with iron they sunk her, they cannot excuse themselves; for they had no authority from anyone competent to give it for putting the barge to such a use. If not technically trespassers, they had taken the Plaintiff's vessel, and in using it for a purpose to which the owners had given no consent, had lost it. As to them it is not material, under our present system of pleading, whether their act be deemed "conversion," or an unauthorized use of and injury to the Plaintiff's property. (Anderson *v.* Nicholas, 5 Bosw. 121, and cases cited, to the effect that one who deals with the property of another—the same not being negotiable paper—must see to it that he acts by authority of one who has title, or who has an authority to confer, sufficient to warrant such dealing; p. 130; affirmed 28 N. Y. 600).

At all events, on demand they could not in such case excuse an omission to return the barge, by showing that in using her for a purpose to which the Plaintiffs had never consented they had sunk her (cases cited in Sarjeant *v.* Blunt, 16 J. R. 74; Murray *v.* Burling, 10 J. R. 172; Campbell *v.* Stakes, 2 Wend. 137; Fish *v.* Ferris, 5 Duer, 49; Ely *v.* Ehle, 3 N. Y. 506; Rotch *v.* Hawes, 12 Pick. 136; Read *v.* Spaulding, 5 Bosw. 395; 30 N. Y. 630).

On the other hand, if the use of the barge for the transportation of the iron was permitted by the terms or legal effect of the Plaintiff's letting, then the Defendants were neither of them responsible for her loss, unless that loss occurred in consequence of some negligence or want of care in the keeping or use of the barge (Story on Bailment, §§ 397, 400).

Mellen would clearly be liable to the Plaintiffs, if the loss so occurred, whether the negligence were his own, or his agents', servants', or lessees'.

But in such case the railroad company would not be liable for Mellen's negligence, if themselves entirely free from fault.

It is insisted that the jury should have been instructed to de-

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duct from the value of the vessel when sunk, her value in her sunken condition, and therefore the direction to find her value when she was lost was erroneous.

The case appears to have been tried upon a mutual assumption that the barge was a total loss.

No request or suggestion was made to the Judge, that the Defendants claimed any abatement on the ground that she was of value in such sunken condition; and although the fact did appear that the iron was afterward taken out, and the vessel raised no proof was given showing the expense thereof, or the expense of repairing her, if repairs were possible.

It is nevertheless proper to say, if, upon the principles above stated, either Defendant was liable, then on demand such Defendant should have returned the vessel, if he desired to abate any supposed then value from the damages to which he was liable; and if, because without fault, the railroad company was not liable, Mellen was still bound to return the vessel, if demanded, and such return was possible; and her then value furnished no reason for such abatement, if he omitted to do so.

In this aspect of the question of liability I see no ground for the claim that the pleadings will not warrant a recovery for the full value, whether the liability be as in trover, or in a special action in the case for damages.

All the facts are set forth in the complaint, and they warrant a recovery for the full value.

But it is claimed that evidence of what the Plaintiffs paid for the barge, five years before the letting in question, and six years before the trial, should have been received, when offered by the Defendants, on the question of value when lost.

Whether the price paid for a chattel, or the price at which it is sold, be admissible in evidence, depends upon the special circumstances of each case.

Thus, when a horse is sold with warrantee that he is sound, and an action is brought for a breach of warrantee, it is said by Cowen, J., in Cary *v.* Gruman (4 Hill, 625), that the *price agreed* upon by the parties at the time of the sale is strong evi-

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dence of the then value of the horse, if sound; and the cases he cites not only show this, but also that evidence that the purchaser was subsequently offered a much larger sum, is also some evidence that he was, if sound, worth much more than the price paid.

So in Campbell v. Woodworth (20 N. Y. 499), it was held that a sale at auction is some evidence of the value of goods at the time of the sale, on the ground that it is an ordinary mode of disposing of goods in the market, and a means of testing the market value. So that if fairly conducted, and in such manner as to invite competition, it is just to regard it as some evidence of such value.

But this is far short of holding that the price paid for a barge or other chattel, six years before the time at which the present value is to be estimated, is any evidence of such then present value.

If in any case it could be received, it is here altogether too remote. The testimony in ordinary cases as to market value is confined to the time when the value is to be taken; or, in special circumstances, to a reasonable time before or after the day in question (Dana v. Fiedler,, 12 N. Y. R. 40).

There was no error in rejecting evidence of the value of the iron lost. The authorities referred to in support of such evidence refer to cases of gratuitious bailment or mandate, where, if the bailee take the same care of the bailment as he does of his own property of like value, and similarly situated, he is held exonorated. Here the Defendants were bound to so much care, at least, as men of ordinary prudence usually employ in the care of their property.

Nor was it error to refuse to strike out the evidence of the Plaintiffs' ownership, because the bill of sale to them was not produced. The possession by the Plaintiffs, and the evidence of hiring and use under the contract of hiring, were all that it was necessary for the Plaintiffs to prove; that was presumptive evidence of ownership, and entitled the Plaintiffs to recover its value, if they charged the Defendants with responsi-

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bility. There was therefore no necessity for producing the written transfer of the barge to them.

In the case of Dunn *v.* Hewitt (2 Denio, 637), the property in question was taken, not from the possession of the Plaintiffs, but from the possession of the Defendant in the execution, the former owner; the Plaintiffs were compelled, therefore, to make title from him, or fail; and they attempted to do so by proof of sale on execution to one Marshall, and a purchase by Plaintiffs from him.

To prove title by such purchase, the Court held the bill of sale the best evidence.

But for what I deem the error in the charge, the judgment should be reversed, and a new trial granted.

All concur.

Reversed.

JOEL TIFFANY,
State Reporter.

THADDEUS A. LAWRENCE, RESPONDENT, *v.* ALFRED ELY, APPELLANT.

New Trial—Newly-discovered Evidence Cumulative—Discretion of the Court—Appealable Order.

A motion for a new trial on the ground of newly-discovered evidence is addressed to the discretion of the Court, and an order thereupon is not appealable.

When the newly-discovered evidence is merely cumulative, it is not such as would justify disturbing the verdict of the jury by granting a new trial.

IN this case there are two appeals by the Defendant—one from a judgment of the Supreme Court in the Seventh District,

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New trial—Discretion. 46 *N. Y.* 601; 50 *N. Y.* 687; 60 *N. Y.* 649; 35 *Hun,* 254; 36 *Hun,* 22; 41 *How. Pr.* 397; 1 *Misc.* 313 (48 *St. Rep.* 784; 20 *N. Y. Supp.* 716); 48 *St. Rep.* 784; (20 *N. Y. Supp.* 715).

New trial—New evidence—Cumulative. 16 *Misc.* 124 (38 *N. Y. Supp.* 830).

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rendered in favor of the Plaintiff on the report of a referee; and the other from an order of the same Court, denying a motion for a new trial, on the ground of surprise and newly-discovered evidence. No argument is made to show error in the judgment.

The action was on a promissory note made by the Defendant, dated 1st April, 1857, for $3,257.01, with interest, payable one day after date, to Rebecca Barnum or order, and by her endorsed to the Plaintiff.

The defence was: (1) general denial; (2) counterclaim and set-off of moneys paid by Defendant at request of Milo Barnum, the husband and agent of said payee, to apply on said note before the transfer of the note, which took place after the note became due; (3) counterclaim that the said Milo Barnum was the agent of the said Rebecca in taking the note in suit; that the consideration thereof arose out of matters of deal between the Defendant and said Milo, in which the latter acted as agent of the said Rebecca, and in her name; and that the Defendant subsequently paid large sums of money, at the request of said Milo, as such agent, and in pursuance of an agreement with him that they should apply on the note in suit.

The Defendant and Milo Barnum were examined, and gave conflicting evidence. The referee reported in favor of the Plaintiff for the whole amount of the note in suit; holding that as the draft and note set up by the Defendant were made by the husband in his own name, they were primâ facie on his own account, and that there was no evidence to explain or contradict this primâ facie showing; and that as the Defendant held the affirmative, his claim could not be allowed. Mrs. Barnum was subpœnaed by the Plaintiff, and attended at Rochester, where the case was tried, but was not called. The Defendant alleges that he had not transacted any of the business with her personally, and did not know what she would testify to; but supposed from her position, and from the fact of her being

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subpœnaed by the Plaintiff, that her testimony would corroborate that of her husband, and would prejudice the defence.

Judgment was entered Feb. 15, 1861, and exceptions to the report were filed in February, 1861. In January, 1862, the Defendant claims to have discovered that she would testify that she never considered the note in suit as her property, and never claimed any interest in it or exercised any control over it, but that it was made for the benefit of her husband, and she always considered it his absolutely, and he was at liberty to use it as he chose, without any interference of hers. She supposed it was paid in full, or nearly so, until a short time before it was sued in her name, when her husband told her it was not paid. The affidavit of Mrs. Barnum forms a portion of the papers.

On the 3d of March, 1862, the motion for a new trial, on the ground of newly-discovered evidence, was heard upon the affidavits and case now presented, "and opposing affidavits on the part of the Plaintiff," and was then denied. From this order the Defendant appealed to the General Term, where the same was affirmed.

He now appeals to this Court.

John H. Reynolds for Appellant.
George F. Danforth for Respondent.

HUNT, Ch.J.—No question of law is involved in this order, and it is not appealable to this Court. An order granting a new trial on the ground of newly-discovered evidence, surprise, misconduct of jurors, or the like, has always been considered as addressed to the discretion of the Court (Seldon *v.* The Del. & Hud. Canal Co., 29 N. Y. R. 634; Young *v.* Davis, 30 N. Y. 134; Sherman *v.* Felt, 2 Com. 186; see also King *v.* Platt, 37 N. Y.*; 34 How. Pr. R. 26, where all the cases are examined). In such cases this Court never attempts to review the action of the Court below. In Adams *v.* Bush (2 Abb. N. Y. 104), the question was discussed, but no conclusion was reached by the Court; and the later case of King *v.* Platt gives

* 4 Transcript Appeals, p. 19.

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the true rule which should govern the decision. It is discretionary in its nature, and not the subject of an appeal to this Court. If in our power to review the discretionary action of the Court below, we should not have felt disposed to exercise that power in the present case. In the first place, we have not the facts on both sides before us.

The Defendant has presented his affidavit, but the "opposing affidavits," which were before the Court below, are not among the papers. We are entirely ignorant of their contents. In the next place, the evidence is cumulative in its character. The witness Barnum swore to one state of facts, and the Defendant, as a witness, swore to another and different state of facts. The facts now desired to be proven by Mrs. Barnum to sustain the Defendant, and to impeach her husband, are upon the same point, of the same general nature, and come in aid of the testimony given by the Defendant. They are intended to show that the note in suit belonged to her husband, as was insisted by the Defendant, and not to her, as was insisted by the Plaintiff. They were well known to the wife at the time of the trial, and known to the Defendant to be known by her. He then supposed her to be in the interest of the Plaintiff, and to have the same purpose with her husband, and that she would sustain his testimony. He therefore omitted to call her. He now ascertains that she will give evidence to sustain his view of the case, and he therefore asks for a new trial, on the ground of newly-discovered evidence. This will not do. No verdict could stand if this should be held as good cause for setting it aside (People *v.* Superior Court, 10 Wend. 285; Peck *v.* Hiler, 30 Barb. 655). And lastly, the delay of more than a year after the report in making the application, is too great (same auth.).

The judgment and the order appealed from should be affirmed, with costs.

All concur.

Judgment affirmed, and appeal dismissed.

JOEL TIFFANY,
State Reporter.

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JOHN A. VAN BLARCOM, SURVIVOR, &C., APPELLANT, v. THE BROADWAY BANK, RESPONDENT.

Referee's Report—Question of Fact—Presumption.

When the question determined by the referee is one of fact, the opinion of the referee putting a false construction upon the testimony of a witness respecting such fact does not change the question from one of fact to law; and as the judgment of the General Term, reversing the judgment upon the finding of the referee, does not state that it reversed upon an error of fact, it must be assumed that the reversal was upon an error in law.

THE action was brought to recover the proceeds of certain stocks formerly belonging to one Christopher Champlin, who with his partner, one Wood, made an assignment to Plaintiff, Van Blarcom, and Oliver J. Hays, who died since the commencement of this action. The stocks were held as collateral security for liabilities of Champlin to the Defendant, and were in his possession.

The Defendant sold these stocks, under the pledge to the Defendant, with the knowledge and assent of the assignees, and the Plaintiffs claimed to recover the surplus of the proceeds of sale, after satisfying the debts of Champlin, for which they had been pledged. The Plaintiffs also claimed that they were only pledged for certain loans made to Champlin—one of $4,000 one of $5,000, and one of $850—for which the stocks were deposited as collateral, according to the several written obligations by which these debts were contracted and the stocks specifically pledged, and which the proof established.

The defendant insisted that they were also pledged as security for a demand loan of $2,750, secured by Champlin's note, and a deposit of the note of the firm of Roberton & Dustan for $3,000 as collateral; a note of Roberton & Dustan for $3,000, payable three months from date, and yet running

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at the time of the assignment, endorsed by Champlin, and which had been discounted for him.

Another note of Roberton & Dustan, of $2,500, at three months, of the same character as the last above mentioned.

Also for a draft of $3,000 drawn by Champlin on Wood, of Paducah, Kentucky, which the Defendant had discounted, and an overdraft of $1,835.

The Defendant also claimed the right to set off all of the foregoing demands as against the assignees of Champlin. The cause was referred, by an order of the Superior Court of New York, in which the action was brought, to a referee. It appeared upon the trial that the liabilities hereinbefore mentioned were pending on the 27th of February, 1857, when Champlin applied to the Defendant to have the proceeds of the $3,000 draft, which was then unaccepted, and had previously been deposited for collection, passed to his credit as discount.

The President, Mr. Palmer, declined to do this, as it was one-name paper, unless the bank had collateral security.

A conversation was had between Champlin and Palmer, and upon what then took place depends the additional pledge beyond the hypothecation of the stocks previously made.

The referee based his decision mainly upon what occurred at this time, and found that the following conversation took place between said Champlin and Francis A. Palmer, the President of the Defendant, and acting on their behalf, and which conversation constituted a contract between the Defendant and the said Champlin. Said Champlin inquired of said Palmer if the Broadway Bank had heard anything of the draft on C. E. D. Wood, lastly hereinbefore described; said Palmer answered, "No." Champlin then said: "I must have the proceeds of that draft to-day, or I shall go to protest for the first time." He then said: "You hold all my stocks; they are security for my *discounts* and this draft." Palmer then replied, "If that is so, we will put the proceeds of the draft to your credit."

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And the Defendant did thereupon advance to, and put to the credit of the said Champlin, the proceeds of said draft, to wit, the amount thereof, less the discount.

There was some evidence as to interviews between the assignees and the officers of the bank in reference to the nature of the pledge, and some conflict between the testimony of Champlin and Palmer as to the conversation in the bank, and the alleged pledge of the stocks; and according to Champlin's version, no additional pledge of the stocks was then made.

It also appeared that the assignment was made on the sixth day of March, 1857, before two of the notes of Roberton & Dustan were due, and provided for the payment of the partnership debts first, and embraced the stocks in question; and that the stocks were sold by the Defendant, and the sum of $23,800.16 was realized, after the assignment was executed.

The referee found, as a matter of law, that there was no issue under the pleadings as to the title of the Plaintiffs to the stocks in question, subject to any valid hypothecations thereof by Champlin or the Plaintiffs. That by the agreement made betwen Christopher Champlin and the Defendant, on the 27th of February, A. D. 1857, said Champlin made a *further pledge* to the Defendant of the stocks then in his hands, to secure the payment of the draft *drawn by him* on C. E. D. Wood, for $3,000. That the Defendant was entitled to be paid the loans made to Champlin, for which the stocks were pledged by a writing, the draft of $3,000, and a loan of $3,000 made to the Plaintiffs after the assignment, and reported a balance in favor of the Plaintiffs for $8,759.61. Various exceptions were taken to the decisions of the referee upon the trial, and to his report, all of which, so far as material, are noticed in the opinion.

A judgment was entered upon the referee's report, and the Defendant appealed to the General Term of the Superior Court of the city of New York, and a new trial was ordered.

The Plaintiffs having made and filed the proper stipulation, appealed to the Court of Appeals.

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William M. Evarts for Appellant.
Everett P. Wheeler for Respondent.

MILLER, J.—I think that it must be assumed in this case that the assignment made by Champlin and Wood was a valid transfer of Champlin's property, as betwen him and the assignors, and that the Plaintiffs were entitled to maintain this action, even if it be conceded that the validity of such an assignment might be questioned by the creditors who were in a position to contest it in an action brought for that purpose.

By the assignment, the title to the stocks passed and became vested in the Plaintiffs; and the Defendant was liable to account to the Plaintiffs the same as it would to Champlin, their assignor, prior to the time when the assignment was actually made and executed. In the subsequent sale and disposition of the stocks, the Defendant acted by virtue of the authority and with the assent of the Plaintiffs, and as their bailee.

The accountability of the Defendant was in no respect changed thereby, as the Defendant had only a right to claim, as a charge against the proceeds arising upon the sale of the stocks, such amount as would have been necessary for the Plaintiffs to have tendered on the day of the assignment, with interest and expenses, to cancel, pay up, and discharge the claim of the Defendant, as the pledgee of the stocks, and not beyond that sum. The stocks being thus pledged for a speficic and particular purpose by the assignors, precludes the idea of a set-off as against the assignees, and no such question arises. If any legal set-off had existed, independent of the pledge of the stocks, it would only be valid against moneys realized upon their sale; and when they were sold, the title to the moneys had passed to the Plaintiffs; and the claim of the Defendant was against the Plaintiff's assignors. At the time of the assignment, no debt was due from the bank to Champlin, and it never became a debtor of Champlin. The debt was due from the Defendant

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to the Plaintiffs, and was never due to their assignors; and to the Plaintiffs alone was the Defendant liable to account.

The question arises, and it is the principal question to be determined in this case, what was the extent of the pledge of the stocks made by Champlin, the Plaintiff's assignor, to the Defendant?

The referee has found that, by the agreement between Champlin and the Defendant, made on the 27th of February, 1857, Champlin made a further pledge of the stocks in the Defendant's hands, to secure the payment of the draft of $3,000. It was entirely competent for the referee to determine, as a matter of fact, from all the evidence in the case, what further pledge, if any, was made of the stocks in question; and as the judgment of reversal does not state that the reversal was made upon questions of fact, it must not be deemed to have been reversed on questions of fact (Code §§ 272, 268). We must, therefore, consider the decision of the General Term, reversing the judgment of the referee, as involving a question of law alone.

Regarding the finding of the referee in that aspect, I think it was not erroneous, and that it cannot be considered as error in law that the further pledge only included the $3,000 draft, unless he has found some fact inconsistent with the pledge found to have been thus made. This has not been done, and therefore the judgment of the referee could not be reversed upon any such ground.

It is not important to examine the question of fact presented to the referee on the trial; but, looking at the evidence in the most favorable light in which it can be regarded for the Defendant, there was not, in my opinion, sufficient testimony to establish a pledge of the stocks for any amount, on the 27th of February, beyond the $3,000 draft. They had been previously hypothecated, by written instruments, for particular loans, which were specified; and any pledge of the stocks for other loans, except the draft for $3,000, was not specifically made at the time last mentioned. The conversation between Champ-

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lin and the president of the bank does not specifically refer to any prior loans; and as all the other liabilities of Champlin were secured, I think the remark of Champlin, that the stocks were security for his discounts and the draft, had reference to the loans for which they were hypothecated, and not to those which were otherwise secured, as well as to the draft then discounted. He evidently meant to refer to loans for which they were pledged, and not to those which they did not cover. These embraced several notes, and did not include the loans made by the Defendant upon the paper of Roberton & Dustan. Nor is it manifest that it was intended to embrace the latter, from anything which passed between the parties at that time. It may also be remarked, that Champlin only desired at this time a discount of the Paducah draft; and it would have been somewhat remarkable if he had offered to pledge the stocks for other papers, without being requested to do so, when it was not claimed that such paper was not already secured to the Defendant, and when no additional security was demanded. It would have been more singular and strange to have made such a pledge, as the only objection made to the proposition to discount the draft in question was, that it was the rule of the bank not to take paper with a single name without collateral. This striking fact renders it quite clear that no objection was made to the discount on account of the other paper, and that the intent of the parties was, that the stocks should be pledged solely and alone as security for the draft. The subsequent interviews between the Plaintiffs and the officers of the bank, tend strongly to sustain the position, that the stocks were not further pledged for anything but the draft. Although, as already stated, the question does not now arise, yet the facts to which I have averted tend strongly to sustain the correctness of the referee's conclusion upon the evidence presented upon the trial.

We have to consider the exceptions taken by the Defendant upon the trial to the exclusion of testimony offered by him. The evidence offered as to the declarations of Champlin prior

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to the assignment, was to the effect that Champlin then understood and stated that all the notes which Roberton & Dustan had loaned to him, and which had been discounted by the Defendant, were to be paid out of the collaterals held by, and which he had assigned to the Defendant, and that an agreement based upon this statement was made, by which the amount for which Roberton and Dustan were preferred in the assignment was fixed.

Assuming that the declarations of Champlin were competent as against the assignees; that they were admissible within the rule of evidence; that they were an admission against his interest at the time when made; that they comprehended a statement of a fact as to the form and effect of the pledge made, and not an opinion of the witness as to the extent and nature of the security; and conceding that these declarations could properly be introduced without first laying the foundation, by calling Champlin's attention to the subject, and were not affected by his subsequent examination as a witness for the Plaintiffs in full on the question of fact at issue,—yet I am of the opinion that in no aspect in which they can be considered does the ruling of the referee, excluding the evidence, furnish occasion for a new trial. As the case was disposed of by the referee, the testimony offered was in no sense material, and could not have affected the result. And even if the declarations of Champlin, and the proof offered, can be considered as of any importance upon the question involved, the evidence was substantially disclosed afterwards upon the cross-examination of the same witness.

As to their materiality, it will be noticed that the referee's finding was put mainly upon the testimony of Palmer, the president of the bank—which was in conflict with Champlin's eivdence as to what took place at the time the stocks were pledged—and the construction he put upon Palmer's statement. The referee ignored entirely the version given by Champlin in regard to the transaction, and considered it was insufficient to overcome the force of the distinct and positive statements

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of Palmer, and accepted the narration of the latter as the precise occurrence. Upon this view of the subject, and upon the basis that Palmer was entirely correct, he decides the case adversely to the Defendant as to a larger portion of the Plaintiff's claim. It is very evident that the evidence offered could have had no influence or weight upon the conclusions of the referee as to the contract between these parties. The declarations of Champlin would have added nothing to the statement of Palmer, which, the referee decided, constituted the basis of the contract; and as no injury would have resulted from their exclusion, there is no good and sufficient ground for a new trial. But if the evidence was improperly excluded, I think it was substantially introduced afterwards, and the difficulty entirely obviated by the testimony of the same witness. The witness testified that he tried to make an estimate of the liabilities of Roberton & Dustan's outstanding before the assignment, and $11,000 was specified, *on the ground he had stated,* and that sum was put in upon the assumption that the firm paid all their notes; that he supposed that he would not have to pay the notes in the Broadway Bank; and it was expected that these notes were to be paid out of the collaterals.

The witness evidently referred to the conversation between him and Champlin, and the grounds stated were what he had previously testified after the offer of testimony was made, and the evidence excluded, and which was, on motion, stricken out, to the effect that Champlin had told him that the Broadway Bank had sufficient collaterals to cover his indebtedness, including the discounted notes of Roberton & Dustan, and that neither the bank nor the firm could lose anything by his liabilities to the Bank. The witness testified afterwards, upon the same cross-examination, that there was an open question about the Broadway Bank collaterals covering all these notes, and that he did not know what the value of these collaterals was, except from Champlin's statement.

It is very evident, I think, that upon comparison, the evidence excluded and that introduced were of the same character;

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and the evidence introduced covers substantially the same grounds, and was to the same effect, as that embraced in the offer. In either point of view, it would seem to be a statement of Champlin's views; and if of any importance, it no doubt had its proper weight with the referee in his determination of the case.

The question put to the Defendant's cashier, whether he could have said, with truth, certain things which he denied saying, called for an inference and conclusion of the witness, and, I think, was properly excluded.

The question put to the witness Dustan, "For what indebtedness or liabilities were these collaterals deposited with the Defendant?" was also properly excluded.

The previous examinations showed that the witness had no knowledge in regard to the subject inquired of, and called for his conclusion, and not for facts.

It would be allowing considerable latitude of inquiry to permit a witness to testify generally as to his knowledge of a fact, when the evidence previously given by him had shown that he was not present when the transaction took place. If the witness had any knowledge of particular facts bearing upon the question, his attention should have been called to them, and the facts proved; but without proof of any knowledge whatever, the question put was not admissible.

The question put to the Defendant's cashier, whether he had stated, in an interview with Van Blarcom, when the notes were discounted for the assignees, anything in regard to the notes held as collateral, does not appear to have been material; as the question was, whether the witness had made the statement sworn to by Van Blarcom, and he had already denied that he had.

As no right of Sett-off existed, there was no error in rejecting the claim for a balance of account in favor of the Defendant. There was no such variance, I think, between the assignment set forth in the complaint and the evidence, as could not be disregarded.

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Nor was the Plaintiff entitled to the affirmative in summing up the case.

I discover no error in any of the rulings of the referee; and am satisfied, after a careful examination, that the judgment of the General Term of the Superior Court should be reversed, and that the judgment entered upon the referee's report should be affirmed.

MASON, J.—The question of the extent of the pledge of the stocks in this case was nothing but a question of fact, to be determined by the referee upon a conflict of parol evidence; and he found the fact against the Defendant as to the three notes which he rejected, and it is not easy for the judicial mind to perceive how the Court below, in reviewing this judgment, could reverse it upon a question of law, on this very ground alone.

It certainly was a question of fact, depending entirely upon contradictory parol evidence. The fact that the referee, in his opinion, put a certain construction upon the testimony of Mr. Palmer, the president of this bank, while considering this question of fact, does not any the less make his decision of the whole question a question of fact, and not of law. Here was a most paplable error committed by the Court below, in reversing this judgment upon this ground, upon a question of law.

It is true that in determining this question of fact, the ref-palpable error committed by the Court below, in reversing eree went into a discussion of the construction which should be put upon certain language employed by Palmer in giving his testimony; and because he arrived at a different construction from what the Court below did, they seemed to think that they could reverse his finding of the fact itself as a question of law.

As the judgment of reversal does not state that the reversal was made on a question or questions of fact, the Code declares that the judgment *"shall not be deemed to have been reversed on questions of fact;"* and the consequence is, that this Court can not review this question of fact under the Code (§§ 272,

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268). This judgment, therefore, must be reversed, unless some error in law was committed upon the trial.

I am satisfied, after a careful examination of the exceptions taken to the rulings of the referee upon questions of evidence, that they furnished no grounds for the reversal of the judgment; and so the Court below must have regarded it.

The various offers to prove what Champlin had said in regard to the nature and extent of this pledge, could not be admitted as primary evidence in this cause; and as no foundation was laid for the introduction of this evidence for the purpose of impeaching him, it was properly rejected. The Defendant was not in a condition to impeach this assignment, as made to hinder, delay, or defraud creditors; and, besides, no such defence was set up. I am not able to perceive any error committed upon the trial; and advise the reversal of the judgment of the General Term of the Superior Court, and the affirmance of the judgment entered upon the report of the referee.

All concur.

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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JAMES GIBSON, ASSIGNEE OF HUGH McCROSSAN, RESPONDENT, *v.* WILLIAM C. HAGGARTY AND OGDEN HAGGERTY, APPELLANTS.

Assignment—Chose in Action—Payment by Debtor—Supplementary Proceedings—Debtor of Judgment-debtor.

A payment, by the debtor of a judgment-debtor, to the holder of the judgment, in obedience to the order of a Judge in supplementary proceedings, is a valid payment as against an assignee of the judgment-debtor who has given no notice of the assignment.

APPEAL from an order of the Supreme Court at General Term in the First District, reversing a judgment for the Defendants at Special Term, and ordering a new trial.

The Defendants in some dealing with Hugh McCrossan received from him a note, as security for his indebtedness to them. The note being paid, there remained a balance in their hands due to McCrossan.

Sturgis and others, judgment-creditors of McCrossan, instituted supplementary proceedings under § 294 of the Code, and procured an order requiring the Defendants to appear and answer concerning their indebtedness to McCrossan; and upon such examination the Judge made an order requiring them to pay the said balance on and towards the satisfaction of the judgment, and they paid the same accordingly. The Judge made no order requiring notice to be given to McCrossan.

Thereafter the present Plaintiff brought this action against the Defendants to recover the same sum, upon the ground that, prior to such order, the judgment-debtor, McCrossan, had assigned to the Plaintiff the claim against the Defendants. Of that assignment the Defendants had no notice.

Upon the trial at Special Term the Judge held the Defend-

Supplementary proceedings—Third party—Rights of debtor. 41 *N. Y.* 217; 48 *N. Y.* 32; 11 *Abb. N. S.* 83; 14 *Abb. N. S.* 71; 34 *App. Div.* 162 (54 *N. Y. Supp.* 417).

Chose in action—Assignment—Payment to assignor—Notice. 61 *N. Y.* 593; 44 *How. Pr.* 444.

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ants protected by their payment, in pursuance of the order above mentioned, and judgment was accordingly rendered for the Defendants. The Plaintiff appealed to the General Term, where the judgment was reversed, and a new trial ordered. The Defendants (giving the requisite stipulation) appealed to this Court.

E. N. Taft for the Appellants.
J. C. Dimmick for the Respondent.

WOODRUFF, J.—I think the Plaintiff cannot maintain this action. He claims to be entitled to certain moneys due from the Defendants to his assignor, McCrossan.

Sturgis and others, judgment-creditors of McCrossan, have collected those moneys in right of McCrossan, and by virtue of proceedings which gave to them all the authority, *as against these Defendants,* which McCrossan himself would have had if he had called on the Defendants and received the money. They having no notice of any assignment to the Plaintiff, a payment to McCrossan would have operated effectually to discharge the Defendants, and the Plaintiff's remedy for the collection of what was due to him, would have been an action or proceeding against McCrossan for so much money had and received, &c. That this would have been the relative position of the Plaintiff and the Defendants, had the latter paid the money to McCrossan, is clear beyond controversy or discussion.

If, then, the proposition above stated is correct, viz., that the supplementary proceedings and order of the Judge in question in this action, gave to the judgment-creditors of McCrossan an authority to collect the money from the Defendants, as available to the latter for their protection, as the authority, or rather, the power of McCrossan himself, then the Defendants are protected by the payment.

To the suggestion that the Plaintiff cannot be deprived of his property without due process of law, it must be answered, that the law protects the Defendants in paying their debts to their creditor, or any one who comes clothed with such authority as

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the creditor can confer, notwithstanding such payment would operate to deprive the assignee of the responsibility of the original debtor. The title of the assignee was but an equitable title, and if he would protect it he must use the means the law requires for its protection. The grantee of land may lose his title if he do not record his deed, and the assignee of a chose in action not negotiable may lose his equitable right to proceed against the debtor if he gives no notice of the assignment.

The Plaintiff had no reasonable nor equitable complaint to make that notice of the proceedings was not given to him, when he had given no notice of apprising the Defendants that he had any interest.

It is suggested that notice might have been, and ought to have been given to the judgment-debtor, McCrossan. I think it ought always to be given (when notice can be served on him) before an order is made requiring the parties examined to pay over; but the statute makes it discretionary with the Judge. His omission to do so does not change or affect the legal operation of the proceedings; and as respects this Plaintiff, it would not affect his position. McCrossan might not have regarded the notice.

The case stands (in reference to the argument that the section does not authorize the payment of the money to the judgment-creditor, because, having been assigned, it was not "due to the judgment-debtor") just as it would on the appointment of a receiver, and an action by him against the Defendants, recovery and payment by them to the receiver. There is no room to doubt that such payment would be a full defence.

If, before the Code, or now, a creditor's bill were filed and a receiver appointed, and such receiver had brought an action against the Defendants, and recovered the money, it cannot be questioned that payment on such a judgment would protect the Defendants against the Plaintiff (the assignee), of whom they had never heard; and it is no less clear that a payment by them to such receiver, without suit, would have the same effect, and yet, in either case it might be said, with the same propriety as

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in the present, that the Plaintiff was deprived of his property without due process of law.

I am not able to perceive the force of the suggestion, that an order under § 292 must be first obtained, before the Judge can obtain jurisdiction to make the order for the examination of a debtor, of the judgment-debtor, and direct the payment of what he owes towards the judgment-debt. The terms of § 294 authorize a proceeding thereunder, whether the execution has been returned or only issued. It expressly leaves it in the discretion of the Judge to cause notice to be given, or to suffer the proceedings to be had without the presence of the party to the action. At a time when proceedings could only be taken under § 292 (then § 247, Laws of 1848, p. 543), after an execution had been returned, the subsequent sections provide (§ 248) that after the issuing of an execution, a person indebted might pay to the Sheriff.

And (§ 249) upon an affidavit that a person is indebted to the judgment-debtor, the Judge might require him to appear and be examined, and (§ 252) the Judge might order the property due to the debtor to be applied on the judgment.

I concur fully in the observations made in Sherwood *v.* The Buffalo and N. Y. City R. R. Co. (12 How. 139, and cases cited), that to permit a proceeding under § 294, without any notice to the Defendant, and so without giving him an opportunity to appear and assert his rights, opens the door to injustice and fraud. The judgment, as there suggested, may have been paid, or there may be other equitable, and even legal reasons, why it should not be enforced by the Plaintiff.

These are considerations, however, which are addressed to the Judge who has the discretion to exercise, or to the Legislature which has conferred that discretion.

It is however, pertinent to say, that notice to the judgment-debtor would not have been of any service to the present Plaintiff; and he had voluntarily neglected to give the notice of assignment, which would have enabled, and made it the duty, of the Defendants to resist the order made upon them.

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The order granting a new trial must be reversed, and the judgment of the Special Term affirmed.

All concur, except BACON, J.

BACON, J. (dissenting).—The Plaintiff, as assignee of Hugh McCrossan, brings this action to recover of the Defendants the sum of $105, under the following circumstances:

McCrossan, in November, 1858, being indebted to the Defendants, delivered to them, as collateral security, a note against Martin & Co. for a larger amount. This note was collected by the Defendants, and after applying enough of the proceeds to pay their debt, a balance of $105 was left in their hands belonging to McCrossan.

Previous to the collection of this note of Martin & Co., and on the 26th of April, 1859, McCrossan had made an assignment of all his property to the Plaintiff. On the 2d of July, 1859, William Sturgis and others recovered a judgment against McCrossan of some $1,900, on which execution was issued, and returned unsatisfied. Upon a proper affidavit, an order was obtained on the 3d of November, 1859, for the Defendants to appear and be examined, under § 294 of the Code, as to any money in their hands belonging to the judgment-debtor, McCrossan; and upon such examination (no proceeding having been taken against the judgment-debtor under § 292, nor any notice of the order requiring Defendants to appear having been given to him), and order was made requiring the Defendants to pay the balance in their hands, $105.46, to the judgment-creditors, Sturgis and others, of McCrossan, and the same day the money was paid over, pursuant to the order.

These facts are all admitted by a stipulation in the case between the attorneys of the respective parties, and it is further admitted by the stipulation, that no notice of the assignment by McCrossan to the Plaintiff was given to the Defendants before the money was paid over by them under the order, and that the only question to be raised on the trial was, as to the validity and legality of the order under which the Defendants paid over the money claimed in the suit.

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On the trial, before Justice Barnard, without a jury, the complaint was dismissed; and on appeal to the General Term, the order dismissing the complaint was reversed, and a new trial granted, from which the Defendants appealed to this Court, stipulating that a final judgment may be rendered against them, if the order of the General Term is affirmed.

By the stipulation in the case, the only question presented for adjudication is the validity and legality of the order made under the 294th section of the Code.

If a literal and narrow construction should be given to the stipulation, it would only raise the question, whether it is competent to make such an order as an independent proceeding, and disconnected with any order under the 292d section, requiring the judgment-debtor first to appear and be examined.

If this were all the point presented, the result would, I think, be very clear that the Defendants would be entitled to judgment. It has, indeed, been a mooted point, whether proceedings under § 294 can be taken in any other way than as connected with, and ancillary to, a proceeding against the judgment-debtor, under the 292d section. Decisions can be found at General and Special Terms in the Supreme Court on both sides of this question. If it is necessary, to set the question at rest, for this Court to decide, I am clearly of opinion that these two sections are susceptible of, if indeed they were not intended to have an operation independently of each other. They have no necessary connection in terms, nor is the issuing an order under § 296 made dependent upon an order previously issued against the judgment-debtor; and, indeed, if this were not so, cases would every day arise where no proceeding whatever could be taken under § 294. If the judgment-debtor should abscond after judgment, and before execution, or the judgment should be rendered against a corporation, there would be no possibility of reaching a claim due the judgment-debtor in the hands of a third party under this section, since no order under § 292 could be issued in such a case.

To obviate the objection, that in this way an order may be made, transferring the debt, without the creditor having an

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opportunity to be heard, it is provided by § 294 that the Judge issuing the order my require notice of the proceeding to be given, in his discretion, to any party to the action.

This will in practice, usually, and, we think, always should be done, unless, for reasons that commend themselves to the Judge, it is deemed best to omit it, and affords a sufficient safeguard to the rights of Judgment-debtors. Cases may easily be conceived where such notice would not be expedient, and the fact that provision is made for it, is a strong implication that the true construction of the two sections is, that they operate, and may be availed of, entirely independently of each other, and that consequently, in this case, so far as this question is concerned, the order under the 294th section of the Code was legal and valid.

But this does not end this case, for I think that stipulation has a broader meaning, and involves the inquiry, whether the order, and the payment made under it, were valid as against the Plaintiff in this suit, who became the owner of the claim before the order was made or the money was parted with by the Defendants. It was so treated by the counsel on both sides, and the judgment of the Supreme Court proceeds on that assumption. So treating it, I think the judgment of the Supreme Court was right in holding, that to take the property of a party by an order granted ex parte, and without an opportunity of being heard, is to deprive one of his property without due process of law. It is property belonging to the judgment-debtor which the order under § 294 professes to reach, and which it only can reach; and this money, at the time the order was issued, and the payment was made, was not the property of the judgment-debtor, but of the Plaintiff.

This fact is conceded in the case, and it can with no show of reason be claimed, that by virtue of an order without a hearing of the party most interested in the question, his rights have been judicially determined, and the property has been passed from his hands into another's without any day in Court given him to assert his claims.

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This cannot be allowed without disregarding, and practically subverting a fundamental maxim of the law, as well as a constitutional immunity provided for the owner of property. It would indeed be a novel proposition, that in a proceeding between A. & B., which does not rise to the dignity of a lawsuit, but is entirely amicable, and perhaps prearranged, the property of C. can, without his knowledge or consent, be taken from him, and bestowed upon one of the parties to such a procedure.

It is said in the dissenting opinion at the General Term, that the assignee (the Plaintiff) was guilty of negligence in not giving notice of the assignment. It would doubtless have been a prudent proceeding on his part, but I know of no rule of law which requires this to be done, under the penalty of a forfeiture of all his right and interest in the property on failure to give such notice. To whom should the notice be given, in order to protect either party from loss? A notice to the original debtor would, of course, have been unavailable.

There is no proof that the Plaintiff knew that the debt of Martin & Co. had been transferred to the Defendants, nor on what terms they held the balance of the fund; and he surely could not be chargeable with knowledge or notice that Sturgis & Co. were about to take a proceeding that would seize the fund and dispose of it without an opportunity to the Plaintiff to interpose any objection, or assert his claim.

The order appealed from should be affirmed, and judgment rendered for the Plaintiff, pursuant to the stipulation, for the sum of $105, with interest from January 13, 1860, together with costs.

Order granting new trial reversed, and judgment of Special Term affirmed.

JOEL TIFFANY,
State Reporter.

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REUBEN ROBIE, PERRY S. DONAHE, AND DAVID RUMSEY, TRUSTEES OF SCHOOL DISTRICT NO. 5, IN BATH, RESPONDENTS, v. WILLIAM SEDGWICK AND RICHARD HARDENBROOK, APPELLANTS.

Ejectment—Evidence of Title.

In an action to recover possession of the site of a school-house, where the Plaintiffs had been in possession as trustees of School District No. 5 for many years, claiming title under the deed of said site to said district in 1812, &c., as against Defendants, who had been in possession about ten years without any pretence of title, the Plaintiffs are entitled to recover.

THIS is an action of ejectment brought by the Plaintiffs, as trustees, to recover possession of a piece of land in Bath, claimed to belong to District No. 5, and was commenced in February, 1859.

The action was tried at April Circuit, 1860, before the Court, without a jury.

The Judge found for Plaintiffs, and judgment was entered in favor of Plaintiffs, with costs. The Defendants appealed to the General Term of the 7th District, and the judgment was affirmed, and the Defendants appealed to this Court.

It was proved on the trial that the premises in question were, in 1819, occupied for use as a school-house lot. There was on it a building used as a school house; and the school kept in it was the only one in the village. It was burned down between 1822 and 1825, and another school-house was built on it, one year after, which was used for school purposes up to 1849, when it was again burned. After the house burned down in 1849, Mr. Barnes, who owned adjoining lands, fenced the lot in with his, and occupied it until 1851, when he sold out to Whiting & McCall. He gave them a quit-claim deed of the school-house lot, for which they paid nothing. McCall & Whit-

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ing occupied the lot, and the Defendants were in possession of the lot under a contract from McCall & Co. to purchase.

School meetings were held in the house, trustees were elected, school-houses were erected, and all the business connected with a school district was transacted by the district, from 1819 down to the time of the trial.

The Plaintiffs proved, by two of the trustees, that no records of the school district, previous to 1846, could be found; and the records of the district, from 1846 to the time of the trial, were offered in evidence, from which it appeared the Plaintiffs were trustees of the district, and it was admitted by Defendants' counsel that Plaintiffs were acting as trustees of District No. 5, in Bath, when this action was commenced.

The Plaintiffs then gave in evidence a deed, dated 29th December, 1812, from Henry A. Townsend and others, to four persons, "Trustees of Bath School," for the premises in question, with habendum clause to them and their successors in office forever, with covenant of warrantee, and proved that the premises described in the deed were the same mentioned in the complaint.

Defendants moved for nonsuit, which was denied, and they excepted. The Defendants then gave in evidence a quit-claim deed, dated October 8th, 1824, from Henry A. Townsend to the trustees of School District No. 5, of the premises in question, containing a clause that the premises should be forever used for the purposes of a school-house.

Francis Kernan for Appellants.
David Rumsey for Respondents.

HUNT, CH.J.—The first objection to the recovery in this case is based upon the allegation that the Plaintiffs have not shown themselves to be a corporation. It was admitted upon the trial, by the Defendants' counsel, that when this action was commenced, the Plaintiffs were acting as trustees of School District Number Five. It was found that the records of the school district, prior to 1846, could not be found. Since that period

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the records show a continued action and succession of trustees of the district No. 5. The Defendants themselves introduce a deed from Mr. Townsend, dated as early as the year 1824, in which a conveyance was made of the premises in question to three persons designated as "Trustees of School District No. 5, in the town of Bath." The Statute of April 9th, 1795 (3 Greenleaf's Laws N. Y. p. 252), and of 1812 (1 Rev. Laws 1813, p. 258), provided for the division of towns into districts, and the elections of separate trustees.

The deed of December 29th, 1812, was made to Dugald Cameron and others, "Trustees of Bath School." The deed of 1824, as already stated, was to the "Trustees of School District No. 5, in the Town of Bath."

I think other facts sufficiently show that the district has been divided, and a new corporation, as the successor in part of the old one, organized into the district termed No. 5.

Bearing in mind not only the existence of corporations by presumptive right, but the statutes quoted above, there is sufficient ground for presuming the existence of the corporation in question, especially as against simple trespassers.

It is also objected that the Plaintiffs established no title to the premises.

The action was commenced in February, 1859. The Defendants, and those under whom they claimed, had been in possession for about ten years, with no pretence of title.

It is apparent that the Plaintiffs claimed to own, and actually occupied these premises, under a claim of title, based upon the deed of 1812. The deed of 1824 may be fairly assumed to have been given in aid of the title under the former deed, and was given to the trustees of this district.

Under the title thus derived, whether effective or insufficient, this district occupied the premises, and maintained an actual *occupation,* until the fire in 1849.

The earlier deed may leave some doubt as to the claim of this particular district, as it was made to the trustees of Bath School, generally.

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The deed of 1824, however, specifies this particular district, and from that time until 1849—a period of twenty-five years—this same district claimed to own under this deed, and actually possessed the premises in question.

This establishes a title in the Plaintiffs, and authorizes the recovery in their behalf.

The deed of 1824 conveys the premises "as a site for a school-house, and for no other purpose."

If this is a condition, and if it has been violated, that is a matter of no consequence to the Defendants. It is between the parties to the deed or their representatives only. No others can allege a breach of the condition, or take advantage of it.

Trespassers can acquire no right under such a claim (Welch *v.* Silliman, 2 Hill, 491).

Whether the Plaintiffs acquired a title under this deed, I have not considered.

As a claim of ownership, under which a possession for a sufficient length of time will ripen into a title, and without reference to the condition, it is undoubtedly available.

The judgment should be affirmed, with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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JOHN B. DINGELDEIN, APPELLANT, *v.* THE THIRD AVENUE RAILROAD COMPANY, RESPONDENTS.

Contract—Indebtedness—Assumption—Liability to Third Party.

Where in a contract between A. and B., B., upon a valuable consideration received from A., promises to pay a certain sum of money to C., the latter may maintain an action for the recovery of the same.

Where a partnership owned a valuable franchise, and had rendered themselves liable to pay a certain sum of money to a third party, and on sale of their said franchise had stipulated that the purchaser should assume and pay such liability, held, that such third party might recover the same of said purchaser.

On the 1st day of January, 1853, the corporation of the city of New York made a grant to certain parties for a railroad in the Third Avenue in said city.

Thereupon the grantees, in connection with other persons, including the Plaintiff, formed a partnership for constructing and operating the road, and called themselves the Third Avenue Railroad Company.

The city of New York, prior to June, 1853, had directed a sewer to be built in the Third Avenue, and caused proposals to be advertised for doing the work.

The company deeming it to their interest to have the building of the sewer under their control, made arrangements whereby several of the company put in bids for the work. The two lowest bids were by Benjamin and Dingeldein, for the company.

On the 21st of June, 1853, the company passed a resolution directing their committee on sewers, consisting of Hart,

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Mortgage—"Subject to"—Assumption. 78 *N. Y.* 151 (7 *Abb. N. C.* 182;) 1 *Hun,* 155 (3 *T. & C.* 666;) 51 *Hun,* 400 (21 *St. Rep.* 243; 4 *N. Y. Supp.* 39); 45 *Super Ct.* 533; 7 *Daly,* 327.

Contract—For benefit of third person. 40 *N. Y.* 438; 45 *How. Pr.* 181.

Contract—Invalidity—Necessity of pleading. 127 *N. Y.* 376 (38 *St. Rep.* 910).

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Reynolds, and the Plaintiff, to have the sewer constructed on the most favorable terms, and any deficiency in the cost of the work which they were thereby directed to have done, over and above what the city might pay, should be paid by the company.

Pursuant to this resolution, the contract was awarded to Plaintiff as the lowest bidder.

Hart and Reynolds, two of the committee, were offered as security on both bids, and the contract was made by Plaintiff, on his bid, on the 29th of June, 1853.

Dingeldein began work under the contract on 9th of July, 1853, and completed it in August, 1854.

He received from the city $7,062.28, and the cost of building the sewer was $10,938.17.

On the 8th of October, 1853, the Defendants were incorporated, and on the same day the former partnership transferred all their property, including the grant to the newly incorporated company, for the consideration of $1,170,000. That deed of transfer, which was also executed by the Defendants, contained an acceptance by the Defendants of the transfer, and was "subject to the payment by said parties of the second part, of all the money which the Third Avenue Railroad Company (partnership) are, by a resolution adopted by said company, bound to pay on account of sewers in the Third Avenue, the contracts for the construction of which were awarded to Oscar F. Benjamin, one of which sewers is now being constructed by John B. Dingeldein."

While the work was in progress, the officers of the Defendants gave directions in regard to it, and thereby increased the expense.

The cause was tried before a referee, who reported for the Plaintiff, to the amount claimed in the complaint.

The referee found, as matter of fact, that the Defendants were cognizant of the Plaintiff's work during its progress; their agents or officers were often, if not daily, during its progress, on the said road, between the termini of his sewer; that after October 8, 1853, the Defendants' superintendent gave the Plaintiff directions about carting away the dirt, and keep-

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ing the track clear, which directions were known to and recognized by the Defendants' president.

On appeal to the General Term of the Superior Court of the city of New York, that Court set aside the report and ordered a new trial.

The Plaintiff now appeals to this Court, stipulating that if the judgment be affirmed, judgment absolute may be rendered against him .

John W. Edmonds for the Appellant.
Clarkson N. Potter for the Respondents.

HUNT, CH.J.—Two principles applicable to this case must now be deemed as settled.

First, that in a contract between A. and B., wherein B. assumes and undertakes, upon a good consideration from A., to pay a certain sum of money to C., the latter may maintain an action against B to recover the money, and this although the arrangement was originally made without his knowledge or assent. This principle has been established, both where personal property was the subject of the contract, and where real estate was conveyed, upon which there was a mortgage, the amount of which the grantee promised that he would pay to the mortgagee (Lawrence *v.* Fox, 20 N. Y. R. 268; Burr *v.* Beers, 24 N. Y. R. 178; Hartly *v.* Harrison, id. 171; Russell *v.* Pistor, 3 Seld. 171).

Secondly, that where land is conveyed simply "subject to a mortgage," and there is no express agreement to pay, no agreement will be implied, and no action involving a personal liability can be maintained by the mortgagee against the buyer (Belmont *v.* Coman, 22 N. Y. R. 438).

The Plaintiff basis his claim upon the first of these principles.

The Defendants resist it upon the second.

If the article of transfer of October 8, 1853, may be fairly held to contain a promise to pay the Plaintiff's debt, he may recover upon it. If not, he must fail, or seek some other ground. In the case of Belmont *v.* Coman (supra), it was held that the

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The deed contained full covenants, and the recital of the mortgages was to qualify simply the grantor's liability on his covenants. The conveyance of the land, with its liability to the incumbrances specified, was the evident and sole intention of the parties. The deed containing no express promise to pay the liens, it was held, and rightly, that none should be implied.

In the present case, both the language of the instrument, and the intent of the parties, are different.

Here was no incumbrance on the property conveyed. The contract was merely the personal obligation of the partnership, and was not a lien upon the property conveyed. The intent to qualify a liability arising from such lien upon the property conveyed could not therefore exist.

The only conceivable intent with which this sewer contract was thus referred to, was to furnish the evidence that the new company would pay to Dingeldein the amount which the partnership was bound to pay under the resolution referred to.

The fact that in Belmont *v.* Coman the words were necessary to qualify the grantor's liability, and that here there was no such occasion, gives a different rule for the construction of the words in the two cases.

The language, too, is different, and may well bear a different construction.

In Belmont *v.* Coman the land is conveyed "subject to the mortgage."

There is a significant difference between the expressions "subject to a mortgage," and "subject to the payment of a certain debt."

In the present case, the property of a partnership, consisting of a railroad franchise, a road partly built, cars, horses, sleighs, harness, and licenses, is transferred to a corporation, subject to the *payment* by the parties of the second part of all the money which the partnership are bound to pay on account of sewers, specifying the claim.

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They do not take the property "subject" to an incumbrance of the sewer debt, for there is no such incumbrance.

It formed no lien on the property sold, and had no connection with the subject, unless it was intended to be assumed. They take it subject to "the payment" by themselves of the sewer debt—i. e., to a liability by themselves to pay the debt. They undertake to relieve the partnership from the payment of this debt, and to make themselves liable or responsible for it. That is the subjection or service to which they bind themselves.

No other meaning can be given to this language, and no other intent can be imagined in the minds of the parties, than that the corporation made itself responsible for the payment of the sewer debt. The whole clause is irrelevant and useless except upon this theory.

In my opinion the referee was right in holding that this language amounts to an agreement to pay, and the General Term were in error in reversing the judgment.

The Appellant insists that, under the circumstances of the case, the Plaintiff could recover, although there had been no mention of the contract between the parties, and cites many authorities to sustain his position. Without passing on this question, I prefer to place my judgment upon the ground that there is a contract between the parties, by virtue of which the Plaintiff is entitled to recover.

The Respondents insist that the agreement between Dingeldein and the partnership was in violation of public policy, and illegal and void.

This is not set up as a defence in the case, and no such issue was before the referee, and we are not called upon to decide it. The referee has not found that there was fraud, or bad faith, or facts which necessarily constitute illegality or fraud.

All intendments and presumptions are to be made in favor of the report, and none against it.

The judgment of the General Term, ordering a new trial, transaction amounted simply to a conveyance of the equity of redemption of the land.

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should be reversed, and the judgment upon the report of the referee affirmed.

All concur.

Reversed.

JOEL TIFFANY,
State Reporter.

STEPHEN H. GRIFFIN ET AL., RESPONDENTS, *v.* WM. BANKS ET AL., APPELLANTS.

Husband and Wife—Deed of Separation—Consideration—Gift—Trustee—Credit to Wife—Liability of Husband.

A gift by the husband to a trustee to hold for the use of his wife, accompanied by a transfer of the possession, is operative to vest the title in the trustee irrespective of any consideration therefor.

Where credit is given solely to the wife upon a sale to her, the husband is not liable, even though they live together as husband and wife.

A. & M. S. Thompson for Respondents.

J. H. Reynolds for Appellants.

GROVER, J.—The only question in this case is, whether the Appellants acquired a title to the property in question, by virtue of the assignment thereof to them by the wife, in trust for her creditors, which is good as against the title of the Respondents acquired by virtue of an assignment subsequently made to them by the husband for the benefit of his creditors.

That the relation of husband and wife between Bruce McKinney and Mary B. McKinney was created by their marriage in 1842, and continued to exist down to the time of trial, clearly appears from the facts found by the Court below, which findings were warranted by the evidence.

All the personal property of his wife, in possession at the time of this marriage, became at once, by virtue thereof, vested

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Husband and wife—Agreement for separation. 4 *App. Div.* 599 (72 *St. Rep.* 113; 36 *N. Y. Supp.* 892).

Marriage during life of husband—Mistake—Property rights. 45 *Hun,* 282 (3 *St. Rep.* 132).

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in the husband (2 Kent's Com. 130; Clancy's Rights of Women, 3).

He continued the owner of the property used by them in the business down to their separation in 1844. (See authorities supra.)

The rights and powers of Mrs. McKinney, and consequently the title of the Defendants, depend upon the effect of the deed of separation then excuted between McKinney and wife, and George Langdon, and the subsequent acts of the parties to this instrument.

This deed, after reciting differences between the parties, McKinney and wife, and that they had agreed to live separately, provides that all the goods in the two stores then occupied by them, and all the household furniture, and the leases of the stores and dwelling, and the debts that had accrued in the business theretofore done, should thereafter belong to the said Mary, for her sole and separate use, as if she were sole; that the said Bruce should receive, out of the stock and profits of the business, the sum of two thousand dollars, which he acknowledged the receipt of from said Mary; in consideration of which, said Bruce transferred to said Langdon all his right to said property for the use of said Mary, and providing further, that said Mary should pay all the debts that had accrued in said business; that they should thereafter live separately; that said Mary might thereafter carry on such trade or business as she might choose, the same as if sole, without any interference of said Bruce; that the said Mary should absolutely enjoy and dispose of any property she then had, or might thereafter acquire, the same as if sole and unmarried.

It is insisted by the counsel for the Respondents that there was no consideration received by Bruce McKinney for the deed of separation, inasmuch as the entire stock of goods and profits of the business were his, and that, consequently, the two thousand dollars received by him therefrom was but the taking of a part of what was already his own.

In this the counsel is entirely correct; but the further de-

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duction therefrom, that for want of consideration the entire deed is a nullity as to Bruce McKinney, is not quite so clear.

Langdon is a party to the deed, and although not named as trustee for the wife, the transfer of the property to him, for her use, shows that he was a party in that character.

Possession of the property was given to the wife, or Langdon, as trustee, at the time of the execution of the deed, and Bruce McKinney never had anything further to do with it.

If possession was given to the wife, she held it under Langdon, to whom it was transferred by the deed. This, then, although without consideration to Bruce McKinney, was operative as a gift by him to the trustee for the use of the wife, accompanied by delivery of possession, with that intent, and thus effectual as a gift, irrespective of a consideration therefor. Bruce McKinney thus divested himself of all title to the property then on hand, which became vested in Langdon, as trustee of the wife.

It is insisted by the counsel that deeds or agreements of separation between husband and wife *will* not be enforced, either at law or in equity, unless there be a consideration therefor.

This position is correct (Beach *v.* Beach, 2 Hill, 260).

But this is not enforcing the agreement. It merely applies the legal rules governing gifts of chattels, accompanied by delivery, to the agreement and acts of the parties. This gift to Langdon, in trust for the wife, would have been valid against Bruce McKinney and his representatives, without any agreement for separation.

Existing creditors of Bruce might have set aside the transfer as fraudulent as to them. There are no such creditors in this case.

The position of the Respondents is no better than that of McKinney, were he a party (Van Heusen *v.* Radcliff, 17 N. Y. 580).

The property in question was acquired by the wife, in business carried on exclusively by her, in her own name, with the proceeds of the property thus transferred to Langdon, and by purchases upon her own credit, and in her own name, without

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any interference at all of the husband, who lived separate and apart from her, except occasional visits upon his return to New York from his voyages at sea, and without any of his means or credit being used in the business.

The counsel for the Respondents insists that the husband having permitted the wife to carry on this business, and make purchases upon credit, became liable as debtor for such purchases, and cites in support of this position Gates *v.* Brower, 5 Selden, 205, and cases there cited.

A close examination of these cases will show that they are only applicable to cases where the facts warrant the presumption of an authority from the husband to the wife, to make the purchases as agent for him. So far from there being any such presumption in this case, it is wholly repelled by the facts showing an entire want of authority by the wife to use the credit of the husband.

The rule is, that when credit is given solely to the wife, upon a sale to her, the husband is not liable, although they live together, and he sees her in possession of the goods thus bought (Story on Contracts, 4th ed., § 103; 2 Bright on Husb. and Wife, 17, 18; Goulding *v.* Davidson, 26 N. Y. 604). In Knapp *v.* Smith (27 N. Y. 277), it was held by this Court, that since the statutes of 1848 and 1849, enlarging the rights of married women, and before the act of 1860, a married woman might acquire property, by purchase upon credit, to her own use, and that the husband acquired no title to such property, notwithstanding the inability of the wife to make a contract binding herself to pay for such property.

The separation in this case was in 1844, and the business was carried on by the wife until 1854, when she made the assignment to the Appellants, and delivered the property in question to them.

There is no express finding as to when the purchases of the property on hand in 1854 were made, but they must have been after the passage of the act of 1848, as the Statute of Limitations would have been a bar upon all contracts made before that time, when the assignment was made.

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The conclusion is, that Bruce McKinney had no title to the property in question, and that, consequently, none was acquired by the Respondents under his assignment to them.

But if wrong in the above reasoning, how then stands the case? If Bruce McKinney had title to, or any interest in the property, he had expressly authorized his wife by the deed to dispose of the same as she chose, the same as if sole and unmarried. Clearly, he could not annul this power, after execution by the wife, conferring interests upon third persons, to the prejudice of such persons.

It is said there were no such interests, for the reason that, the wife being incapable of binding herself to pay for goods purchased by her upon credit, there were no debts, and, consequently, no creditors for whom the Appellants are trustees.

This, in one sense, is true; but when the wife has actually paid for goods so purchased, the money so paid could not be recovered back by her; and where, as in this case, she has provided for such payment by transferring goods for that purpose, over which she had the absolute power of disposition against all the world, such transfer will not be set aside, although no judgment at law could have been recovered against her for the price.

The title of the Defendants can be sustained under the power given by the husband to the wife to dispose of the goods, which was exercised by her in their favor, before any pretended revocation by the husband.

That power was ample to make an assignment for the benefit of creditors—it was to dispose of the property the same as if sole and unmarried.

The judgment below should be reversed, and judgment entered dismissing the Plaintiff's complaint. As this is a contest between creditors, where equality is equity, this should be done without costs to either party.

All concur.

Reversed.

JOEL TIFFANY,
State Reporter.

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HENRY PLATE v. THE N. Y. CENTRAL R. R. Co.

Former Judgment—Estoppel—Prospective Damages.

Where the same embankment, the same ditches, &c., which by a former judgment have been adjudged to have caused damages to the Plaintiff, are continued, causing subsequently similar injuries, the Defendant will be estopped by such judgment from denying his liability in a subsequent action to recover for like subsequent injuries caused by the continuance of said embankment, &c.

When prospective damages may be recovered discussed by Clerke, J.

CLERKE, J.—This action is brought to recover damages for injuries caused by keeping and maintaining the Defendants' railroad track, and ditches along the side thereof, in such manner as to cause the water to flow back upon land belonging to Plaintiff, in injury of his crops.

George M. Barnes, being then owner of said farm, conveyed, on the 27th August, 1852, to the Buffalo and Lockport R. R. Co., a strip of land five rods wide through the same, on which the railroad was constructed.

The Defendant, by the consolidation of several railroad companies, under the act of 1853, succeeded to all the rights of the Buffalo and Lockport R. R. Co., to said strip of land, and to its railroad.

On the 3d of August, 1853, Barnes conveyed said farm to the Plaintiff, consisting of about 120 acres, subject to the right of way of the Buffalo and Lockport R. R. Co., as the same was then used and occupied by the company. The Plaintiff claims in this action to recover damages for the flooding of his land, since October 11th, 1855, and proved at the trial, that by the construction and maintenance of the Defendants' railroad,

Damages—Continuing trespass—For what period recoverable. 101 *N. Y.* 107; 156 *N. Y.* 605; 22 *Hun*, 282; 50 *St. Rep.* 518 (21 *N. Y. Supp.* 221).

Res Judicata. 25 *App. Div.* 84 (49 *N. Y. Supp.* 251).

Trespass—Prospective damages. 78 *N. Y.* 435.

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large quantities of water, in time of flood, were brought down the railroad ditches from land lying northerly from the Plaintiff's land, which, before the construction of the road, found an outlet into a creek, in another direction, without passing over the said land, and that several times in each year, by reason of the insufficiency of the ditches along the northwesterly side of the railroad, when there were heavy rains and floods, the water accumulated along the side of the railroad, and extended over the land, causing the injuries for which he claims redress in this action.

On the 11th of October, 1855, the Plaintiff brought an action against the Defendant in this action, to recover damages for injury to the same land and crops, from the same cause, and he recovered final judgment in said action. The referee has found that the flooding of the Plaintiff's land, since the 11th of October, 1855, was caused in the same manner as previous to that time, upon which the former judgment was rendered, and that the same embankment and ditches remained in the same condition, from the 11th of October, 1855, to the time of the commencement of this action, in which they were during the time the injuries occurred for which the former action was brought; that the same quantity of Plaintiff's land, and by the same cause, had been flooded, since the commencement of the former action, as had been flooded prior thereto; that the land thus overflowed had been rendered thereby less valuable, and that the crops had been more or less injured in each year, by the same cause, since the commencement of the former action. The referee also found that the Plaintiff had sustained injuries from these same causes, from the 11th of October, 1855, to the commencement of this action, to the amount of four hundred dollars.

As a matter of law, the referee found that the former recovery for injuries sustained by the Plaintiff, from the same cause, establishes the right of the Plaintiff to recover any damages subsequently sustained from the same cause, and that the Defendant by keeping up and maintaining the embankment and

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ditches, and thereby diverting the water to the Plaintiff's land, is liable to Plaintiff for these damages.

It seems to be conceded in the argument before the General Term, that the only question deserving of serious consideration in this case is that relating to the effect of the recovery in a former action. The Plaintiff's counsel contended that the former judgment was conclusive as to the liability of the Defendant for the cause of injury.

The same embankment, and the same ditches which, by the former judgment, it was adjudged caused similar injuries to the Plaintiff, caused injuries subsequently to him, and that judgment concluded the Defendants from denying such liability in this action.

This proposition, I think, can scarcely be now disputed. The case of Mersereau *v.* Pearsall (19 N. Y. R. 108), referred to by the Judge who delivered the opinion at the General Term, fully sustains this proposition. There, an action was brought to recover damages caused by the erection of a dam, and throwing back water upon the wheel of the Plaintiff's sawmill. In a previous action, the Plaintiff had recovered judgment against the same Defendant, in which it was found, as a matter of fact, that the same dam had set the water back upon the Plaintiff's sawmill wheels (which continued without change), causing injury to the Plaintiff. The Court, without hesitation, held the judgment to be an estoppel against the Defendant, as to his liability for the injury. Of course, the extent of the injury and the amount of the damages are left for ascertainment by new proof in the last action. And so it was in the case before us. The amount of the injury was proved before the referee, and was accordingly found by him.

The counsel for the Defendant refers to a case in the 24th N. Y. R., for the purpose of maintaining that the former recovery is a bar to all future actions for injuries caused by the same embankment and ditches, alleging that, according to the opinion delivered in that case, the Plaintiff could have recovered prospective damages, and consequently, the Defendants

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could not be vexed in a second action. If, indeed, he could have recovered damages, not only for all injuries which had accrued previous to the commencement of the action, but also for all injuries which might possibly thereafter accrue, the first recovery would be a bar to the second. There are cases, undoubtedly, in which the Plaintiff is at liberty to prove the direct and immediate consequences of the act complained of, occurring after the commencement of the action, which are so closely connected with the wrong, that they would not of themselves furnish a distinct cause of action. In the old case, where the Plaintiff declared in battery, that he had previously commenced an action for it against the Defendant, and recovered £11, and no more, and that afterwards, part of his skull, by reason of the battery, came out of his head, and for his subsequent damage the action was brought, the Defendant pleaded the former recovery in bar, and on demurrer the plea was sustained (Fetter *v.* Beal, 1 Lord Raymond, 339; S. C. 1 Salk. 11). In Caldwell *v.* Murphy (1 Duer, 233, affirmed, 11 N. Y. R. 416), it was held, that for an injury to the person, resulting from a single act, a single action only can be brought, and therefore on the trial, the nature and extent of the injury in all its consequences, should be considered with its future duration and future effects. In Blunt *v.* McCormick (3 Denio, 283), which was an action brought by a tenant for one year against his landlord, for obstructing his light, the Court remarked: "Suppose the lease to contain a covenant not to obstruct the light, the covenant being a single cause of action, one recovery upon it would be an absolute bar to any future action."

In a word, loss accruing subsequent to commencement of the action, may be recovered when the subsequent damages were the mere incident or accessory of the principal thing demanded; but, in Kentucky, where that rule had been frequently recognized, it was held in the Court of Appeals of that State, in an action for diverting the water of a stream, that the Plaintiff could recover only for the damages sustained previous

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to the commencement of the action (Langford *v.* Owsley, 2 Bibb, 215). In Mahon *v.* The N. Y. Central Railroad (24 N. Y. R. 658), to which I have already referred, it appears in that report that the Judge (myself) who delivered the opinion of the Court in that case said, that if the Defendants did not transcend the authority vested in them by the Legislature, and yet, in constructing their road, had necessarily injured the rights of others, they were equally liable to respond for prospective as well as accrued damages. I am inclined to think that there is some clerical or typographical mistake here; or, perhaps, there was some inadvertence of my own in the haste of writing. It was probably intended, in that opinion, merely to convey the idea, if the action was sustainable merely on the ground that the Plaintiff was deprived permanently by the Defendants of the use of the highway called the Mohawk Turnpike, or that the obstructions were necessarily permanent, that he would be entitled to prospective damages for that deprivation. But, at all events, the decision was made independently of the hypothesis suggested in the beginning of the opinion. At most, it can be considered nothing more than a dictum, and therefore cannot control the present case.

Here the obstructions are not necessarily permanent, and, clearly, the Plaintiff could not have recovered for prospective damages. It would have been impossible to conjecture, much more to prove, the extent or amount of such damages. The cause of the injury might thereafter be abated or removed, so that the Plaintiff might never again sustain any injury; or, from some fortunate change of circumstances, the Plaintiff's land might never again be flooded. I am in favor of affirming the judgment, with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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STEPHEN PHILBIN ET AL., RESPONDENTS, *v.* RICHARD PATRICK, APPELLANT.

Practice—Case—Exceptions to Referee's Report—Findings of Fact.

Where there are no findings of fact by the referee, or exceptions to the referee's report, contained in the case, there is nothing for this Court to review, and consequently the judgment below must be affirmed.

APPEAL from the General Term of the Superior Court of the city and county of New York.

The appeal book contained the summons, pleadings order of reference, report of referee, case, and exceptions to the referee's finding; but the findings of the referee, and exceptions, were printed,—the former preceding the case, and the latter at the end and outside of it, with no especial reference made to either of them in the case.

The exceptions taken relate to the admission of evidence, and are sufficiently stated with the facts which are material, and to which they refer in the opinion.

J. B. Bissel for Appellant.
S. Hand for Respondent.

MILLER, J.—This case was tried before a referee, who reported in favor of the Plaintiffs for $1,427.17.

The case does not contain the referee's report, or the exceptions to the report, and in this respect is not in conformity with provisions of the Code and the practice in such cases. In Otis *v.* Spencer (16 N. Y. 610) it was held that the finding of facts, and conclusions of a referee, must be stated in the case itself, and that this Court will not look for them elsewhere.

Evidence—Books of account. 57 *Hun,* 538 (11 *N. Y. Supp.* 239).

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It appeared that there was no case or exceptions in the case cited, and hence it differs somewhat from the one before us. But the same principle is applicable, and there being no finding of facts, or exceptions to the referee's report referred to or incorporporated in the Appellant's case, there is nothing to review here. All the judgment, for that reason, must be affirmed.

Independent of the reason stated for the affirmance of the judgment, I think there was no error upon the trial. The objection made to allowing Knight, the Plaintiff's book-keper, to read from the scrap-book the list of articles there named, and delivered to the workmen from the Plaintiff's shop, is not well taken. The book was competent evidence, preliminary to proof, that materials were furnished by the Plaintiffs to the Defendant.

The witness testified that the entries were made when the articles were delivered to the carmen, in the course of his business as book-keeper of the Plaintiffs.

He did not recollect the delivery of the articles, and was only able to state what articles actually were delivered from having made the charges in the scrap-book.

They were made at or about the time of the transactions to which they related, and their accuracy was duly verified.

It also appeared that the witness was unable, with the aid of the memorandums made by him, to speak from memory as to the facts.

The evidence, therefore, was properly received. The rule is laid down in Halsey *v.* Sinsebaugh (15 N. Y. 488), and approved in Russel *v.* The H. R. R. R. Co. (17 N. Y. 140). See also Guy *v.* Mead (22 N. Y. 462;) Marcly *v.* Shults (29 N. Y. 346); Hynds *v.* Shults (39 Barb. 600).

It may also be observed that the fact of the delivery and the use of the articles was fully proved by the evidence subsequently introduced, and if there was any error, it was rendered entirely harmless, and could not affect the result, or work any injury to the Defendant (The People *v.* Gonzalez, 35 N. Y.

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49, 60). Nor was there any error in the introduction of the bills of work done and materials furnished by the Plaintiffs for the Defendant.

Both of them had been furnished to the Defendant; and in connection with proof of the correctness of the charges made, and a conversation with the Defendant as to one of them, they were properly received as evidence.

The judgment must be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

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HIRAM SLOCUM, &c., RESPONDENTS, *v.* CHARLES H. BARRY, APPELLANT.

Practice—Trustees—Express Trust—Liability for Costs—Order of Court.

Where Plaintiffs sue as trustees of an express trust and are defeated in the action, no execution can be issued against them *personally,* except by the express order of the Court.

John H. Reynolds for Appellant.
Millard & King for Respondents.

BACON, J.—This is an appeal from an order of the General Term, in the Third District, reversing an order of the Special Term, denying a motion by the Plaintiffs to set aside an execution against the property of the Plaintiffs.

The Plaintiffs brought the action to recover from the Defendant the amount of a subscription made by him for the benefit of the Troy University.

In the complaint they describe themselves as trustees of such institution, and they incorporate the subscription, which the Defendant with others signed, by reference, into the complaint.

At the Circuit, the Plaintiffs not appearing to prosecute the suit, the Defendant took the usual order dismissing the complaint, with costs, and upon this a judgment was entered, and an execution issued to collect the amount of costs of the Plain-

Trustees—Charging with costs—Notice—Motion. 48 *Hun,* 185 (15 *St. Rep.* 605); 20 *App. Div.* 519 (47 *N. Y. Supp.* 118); 67 *Barb.* 378; 43 *How. Pr.* 91; 18 *Misc.* 437 (75 *St. Rep.* 1188; 41 *N. Y. Supp.* 790; 26 *Civ. Proc.* 146).

Trustee of express trust—Action—Parties. 118 *N. Y.* 12 (27 *St. Rep.* 750).

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tiffs personally; and the question is whether this can be done without a special order of the Court directing it.

The Plaintiffs are trustees of an express trust, as defined by the 113th section of the Code.

They are the persons with whom, and in whose name, the contract was made, for the benefit of another. The Defendant's counsel claims that the designation of the Plaintiffs, in the complaint, as trustees for the benefit of the Troy University, is mere matter of description, and does not indicate that they sue in any other character than as individuals. This might be so, if it were not for the fact that the subscription is set forth as a part of the complaint, in which the Plaintiffs are distinctly named and designated as trustees for the benefit of the University to be thereafter organized, and their powers and duties minutely defined; and the Defendant, with others, entered into the engagement with them to pay the amounts by him and them subscribed, to them as trustees, and for the purposes set forth in the subscription paper.

Nothing can be clearer than that they acted in a trust capacity, and that the Defendant contracted with them as such, and that their names were used by the cestui que trust for the purpose of enforcing the subscription. No action, I conceive, could have been brought upon this subscription by the Plaintiffs, in any other than a representative capacity, and as trustees of this express trust.

This being so, it follows that the collection of no costs could be enforced against the Plaintiffs personally, without an express order of the Court to that effect.

By the 317th section of the Code, it is provided that where costs are awarded in an action prosecuted by a trustee of an express trust, the same shall be chargeable only upon, or collected out of, the estate, party, or fund represented, unless the Court shall direct the same to be paid by the Plaintiff or Defendant personally, for mismanagement or bad faith in the prosecution or defence of the suit.

The Defendant's counsel insists that, by the judgment in

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this case, the Court did direct the Plaintiffs to pay the costs personally, and that there is no proof to show that the Judge who rendered the judgment did not intend that such should be the result.

No such inference can fairly be drawn from the mere fact that the ordinary direction was given at the Circuit, dismissing the complaint.

The section which provides for such a judgment, only allows it to be given when mismanagement or bad faith is imputed to the party prosecuting or defending; and clearly, this must be made to appear to the Court, in some form, before such an order can be made, or such a judgment rendered. The true practice, we think, is to make a specific application for such an order, founded on a notice to the other party, to the end that he may have an opportunity to repel, if he can, the charge of mismanagement, or the imputation of bad faith.

Such a conclusion cannot legally be drawn from the mere fact that he does not happen to appear when the case is called on the calendar, and an order of dismissal is taken against him.

The question must, in some form, be presented to the Court for its judicial determination. No such application, as far as appears, was presented in this case, and it is substantially conceded that none was made; and the form of the judgment, as rendered, does not authorize the collection of the execution to be enforced, personally against the Plaintiffs.

The order of the General Term should be affirmed, with costs.

Affirmed.

JOEL TIFFANY,
State Reporter.

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T. B. GATES, APPELLANT, v. G. V. N. ANDREWS AND OTHERS, RESPONDENTS.

Fraud—Discovery—Statute of Limitations—Co-partnership—Assignment by one Co-partner.

In actions for fraud the cause of action is perfect from the time of the commission of the fraud, but the Statute of Limitations does not commence to run until knowledge of the fraud is brought to the Plaintiff.

One partner cannot execute an assignment of partnership property for the benefit of creditors without the consent of his co-partner.

J. H. Reynolds for Appellant.
A. J. Parker for Respondents.

GROVER, J.—But a few months elapsed after the recovery of the judgment against Bridger & Bishop, and the return of the execution issued thereon, before the commencement of this action. It is clear that an action like the present cannot be maintained until after the return of an execution, in whole or part, unsatisfied. It is insisted by the counsel for the Plaintiff that the cause of action, within the meaning of the Statute of Limitations, does not arise until the right to maintain the action is perfect. Upon the part of the Defendants it is claimed that the cause of action arises, and the statute commences running against an existing creditor, upon his discov-

Limitation of action—When statute runs—Creditor's Action. 78 *N. Y.* 559; 116 *N. Y.* 415 (26 *St. Rep.* 854; 18 *Civ. Proc.* 216; 10 *N. Y. Supp.* 876); 2 *T. & C.* 618; 47 *How. Pr.* 9; 68 *Hun,* 379 (52 *St. Rep.* 313; 22 *N. Y. Supp.* 1014); 60 *St. Rep.* 75.

Limitations—Fraud—Discovery. 41 *Misc.* 36 (83 *N. Y. Supp.* 639).

Statute of Limitations—Pleading. 14 *Abb. N. S.* 14; 35 *Super Ct.* 101.

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ery of the fraud by the debtor against which redress is sought, although no judgment had been recovered against the debtor. If the latter be the correct construction of the sttaute, this action is barred by the statute, as more than six years elapsed after the discovery by the creditors of the fraud in the assignment of Bridger & Bishop, before the commencement of the action. Section 74 of the Code provides that civil actions can only be commenced within the periods prescribed, &c., "after the cause of action shall have accrued, except . . . a different limitation is prescribed by statute." The sixth subdivision of section 90 provides that "An action for relief, on the ground of fraud, in cases which heretofore were solely cognizable by the Court of Chancery, the cause of action in such case not to be deemed to have accrued, until the discovery by the aggrieved party of the facts constituting the fraud."

It is argued by the counsel for the Respondents that the construction of the above clause is, that the action shall be deemed as accruing upon the discovery of the fraud by the party aggrieved thereby, whether his right of action is then perfect or not. I think this construction erroneous. The provision is not that the cause shall be deemed to arise upon such discovery, but, to prevent running of the statute, it shall not be deemed to have accrued before such discovery—thereby providing for a class of cases where the right of action was perfect, but became barred by the statute before the discovery of the facts upon which such right depended.

The statute had not therefore become a bar to the action in this case.

It is further insisted by the Respondents, that the Plaintiff was not duly appointed a receiver, for the reason that the process in the action in which the judgment was recovered was not served upon Bishop. It is a sufficient answer to this position that no such question was made upon the trial of the action at Special Term.

No ruling was there made, nor any exceptions taken to a

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refusal to make a ruling, upon this point. The provision authorizing the assignees to sell real estate, assigned upon credit, found in the assignment of Bridger & Bishop of the 4th August, 1849, rendered the assignment fraudulent as against their existing creditors (Nicholson *v.* Leavitt, 6 N. Y. 510). The leasehold interest was not estate, within the meaning of the assignment. The inquiry then arises, whether this assignment, being void as to creditors, is made valid by the subsequent assignment made November 15th, 1855, to the two surviving assignees named in the former.

The authority to sell upon credit is not found in the last assignment, nor is it claimed by the Plaintiff that that has been in any way shown to be fraudulent as to creditors. But it is claimed that the first assignment, although fraudulent as to creditors, was valid between the parties, and, as to them, transferred all the title of the assignors to the assignees therein named, and, consequently, the latter must rely upon the title thus acquired, as nothing passed to them under the last assignment, there being no interest in the property remaining in the assignors, except their right to the surplus remaining after the satisfaction of all the debts.

As an original question I should regard this position correct. In Porter *v.* Williams (5 Selden, 142), the Judge, in giving the opinion of the Court, says: "It is believed that the assignor had divested himself of all control over the property by the assignment of the 5th of January, and that he could neither revoke nor alter it." This reasoning appears to me to be sound. But the point was not necessarily involved in the case, as the title of the Plaintiff had attached at the time of the second assignment. The point was decided in favor of the right of the assignee to make valid the first by a second assignment in Merrill *v.* Englesby (28 Vermont, 150), and Ingraham *v.* Wheeler (6 Conn. 277). It is not necessary to pass upon this point in the present case, as the judgment must be reversed upon the point next considered: That is, whether, from the finding of facts by the Judge at Special Term, the last assignment was

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made by Bridger & Bishop, or by Bridger only; and in the latter event, whether he had power to make it. The finding of the referee upon this point is, that on the 15th of November, 1855, another assignment was made by Bridger & Bishop to said assignees, a copy of which forms a part of this roll. A copy is attached to the roll, from which it appears to have been executed by Bridger for both. There is no finding as to whether Bridger had any authority from Bishop to execute this assignment for him. No fact can be presumed for the purpose of reversing a judgment, but every fact as to which there is no finding will be presumed which is necessary to sustain it. From the finding, as a whole, all that is found is, that Bridger executed the assignment for both, and it must be presumed, in support of the judgment, that he did this without authority from Bishop. In Welles *v.* March (30 N. Y. 344) it was held by this Court, that one partner was not authorized to execute an assignment of the property of the firm, in the firm name, for the benefit of creditors, without consent of his copartner; that such an assignment was void as to the creditors of the firm. If a partner cannot execute an assignment of the assets of the firm, clearly a joint debtor cannot of the joint property.

It would follow that the assignment executed by Bridger, in 1855, was not valid, and therefore conld not give validity to the execution by both in 1849. The order reversing the judgment, and directing a new trial, should be reversed, and the judgment rendered at Special Term affirmed.

All reverse.

JOEL TIFFANY,
State Reporter.

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THE FULTON FIRE INSURANCE COMPANY *v.* CHARLES J. BALDWIN.

Demurrer—Grounds of Objection—Capacity to sue—Waiver—Assignment of Cause of Action—Contractor for repairing Canal—Liability.

Where a party, by his contract bound to keep a particular section of the public canal in repair and in good navigable condition, wilfully neglects to remove obstructions to navigation on such section, and by reason whereof a party navigating said canal is damaged, said contractor is liable in a proper action for such damage.

Such cause of action against the contractor is assignable, and vests in the assignee a right to prosecute his action for such damages.

Under a demurrer to the complaint stating for cause only, that the complaint does not state facts sufficient to constitute a cause of action, the Defendant cannot object, on the hearing, that the Plaintiff has not legal capacity to sue.

THIS case comes before the Court on a demurrer to the complaint, and by an appeal from a judgment of the General Term of the Supreme Court in the Third District, affirming a judg-

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Complaint—Incapacity to sue. 53 *N. Y.* 649; 114 *N. Y.* (26 *St. Rep.* 657; 7 *Civ. Proc.* 25); 4 *Hun,* 698; 47 *Hun,* 283 (13 *St. Rep.* 387); 85 *Hun,* 173 (65 *St. Rep.* 840; 32 *N. Y. Supp.* 586); 65 *App. Div.* 121 (72 *N. Y. Supp.* 550); 12 *Misc.* 312 (67 *St. Rep.* 812; 33 *N. Y. Supp.* 1108); 16 *Misc.* 358 (74 *St. Rep.* 384; 38 *N. Y. Supp.* 88); 18 *Misc.* 427 (75 *St. Rep.* 1419; 41 *N. Y. Supp.* 1059).

Negligence—Independent contractor—Liability. 85 *N. Y.* 263; 30 *Hun,* 294; 20 *App. Div.* 296 (47 *N. Y. Supp.* 9); 5 *Lans.* 294, 346; 6 Lans. 263.

Demurrer—Grounds—Statement. 40 *Misc.* 93 (81 *N. Y. Supp.* 272).

Public officer—Neglect of duty—Liability. 42 *N. Y.* 53 (9 *Abb. N. S.* 54); 44 *N. Y.* 124; 46 *N. Y.* 196; 10 *Hun,* 22; 54 *Barb.* 176 (1 *Lans.* 85); 5 *Lans.* 222.

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ment of the Special Term of that Court, sustaining the Defendant's demurrer to the complaint of the Plaintiffs.

The complaint alleges that the Defendant, on or about the 29th day of December, 1859, made and entered into a contract, in writing, with the People of the State, through the Canal Board, whereby he agreed, for the term of three years from the 4th of March, 1860, to keep in good repair, and well bottomed out to its original base or bottom line, free from obstructions, and in good navigable condition, during the season of navigation, all that portion of the Erie Canal known and distinguished as repair section No. 2, and which included the West Troy side-cut; and he further agreed, that in case of any casualty that might obstruct navigation, he would give immediate notice to the Canal Commissioner in charge, and employ such force upon the repair as would insure its completion at the earliest possible moment; that such contract provided for the compensation to be paid by the State; that he entered upon the performance of the contract and received compensation therefor; that on the 18th of November, 1862, a canal-boat was casually sunk in that part of repair section No. 2 known as the West Troy side-cut, and within the section which the Defendant had contracted to keep in repair and clear of obstructions, and that due notice of such obstruction was given to the Defendant; that he neglected to remove the same, but negligently suffered the same to be an obstruction to navigation, at the place aforesaid, till the close of navigation of that year; that subsequent to said obstruction, and on the 25th day of the same month, and after the lapse of sufficient time for the removal thereof by the Defendant, the canal-boat J. Van Buren, Jr., loaded with wheat, belonging to one J. Van Buren, Jr., was proceeding to New York, from Oswego, and, without fault on the part of those in charge of it, ran foul of said sunken canal-boat, and was thereby sunk, injuring the cargo aforesaid to the extent of over $7,000; that the Plaintiffs were at this time insurers of said cargo, by a policy containing a provision that if loss or damage to said

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cargo should be occasioned by any other person or persons, in such a manner that such person or persons should be liable therefor, that all such claims should be assigned to the Plaintiffs; that the Plaintiffs had paid to the said Van Buren the amount of the loss, and had obtained from him an assignment, in writing, whereby, in consideration aforesaid, and of one dollar, he did assign, transfer, and set over to the Plaintiffs, all claim or rights of action he had against the Defendant, for or on account of the matters aforesaid.

The Defendant states a single ground of demurrer, to wit: that the complaint does not state facts sufficient to constitute a cause of action.

The Defendant does not complain in his demurrer that the Plaintiffs are not incorporated, and have not legal capacity to sue.

S. Hand for the Appellants.
J. W. Townsend for the Respondent.

MASON, J.—The case of Robinson *v.* Chamberlain (34 N. Y. R. 389) is in point, and decides that the Defendant, as contractor for repairs, upon the facts stated in this complaint, is liable for the injury complained of, and must respond in damages therefor.

This cause of action is assignable. It was decided in the case of McKee *v.* Judd (2 Kern. R. 622) that a right of action for the wrongful taking and conversion of personal property was assignable, and that under the Code of Procedure the assignee can recover upon the same in his own name.

The case of Waldron *v.* Willard (17 N. Y. R. 466) holds that a cause of action against a common carrier, to recover damages sustained by the Plaintiff to his goods shipped upon the Defendant's boats, and which were sunk on the Hudson River, on their passage up, was assignable. The same is affirmed in the case of Merrill *v.* Grinnell (30 N. Y. R. 594), where the general principle is re-affirmed, that a right of action

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against a common carrier, to recover the value of property entrusted to him, was assignable.

It is only necessary to state the action against the Defendant in this case, to show that it is assignable.

The Defendant, under his contract with the State, to keep this section of the Erie Canal in repair and free from obstructions, owed a duty to perform it, and which enured to the benefit of every citizen in the State who might have occasion to use the canal; and the Defendant's neglect to remove this obstruction, in disregard of the duty which he owed to all who might be concerned in the navigation of the canal, rendered him liable in this action.

The action is, in short, to recover for a loss of property sustained by the Plaintiff's assignor, in consequence of the Defendant's negligence, in suffering this sunken canal-boat to impede the navigation of the canal, and endanger the property of those navigating it.

The only remaining question in the case is, whether the Defendant, under this demurrer, specifying only one ground of objection to the complaint, and which is that the complaint does not state facts sufficient to constitute a cause of action, can insist on the objection that the Plaintiffs are not incorporated, and have not capacity to sue.

There are six grounds of demurrer to the complaint allowed by the Code. The first is, *"that the Court has no jurisdiction of the person of the Defendant, or the subject of the action."*

The second is, *"that the Plaintiff has not legal capacity to sue."*

And the sixth is, *"that the complaint does not state facts sufficient to constitute a cause of action"* (Code, § 144). The 145th section declares that the demurrer shall specify the grounds of objection to the complaint, and that unless it do, it may be disregarded. And section 147 provides, that when any of the matters enumerated in section 144 do not appear upon the face of the complaint, the objection may be

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taken by answer. And then comes in section 148, which declares that if no such objection be taken, either by demurrer or answer, the Defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the Court, and the other objection, that the complaint does not state facts sufficient to constitute a cause of action.

The complaint, in this case, states a good cause of action in favor of John Van Buren, Jr., against the Defendant, and a valid assignment and transfer of that cause of action to the Plaintiffs; and the omission in the complaint to allege that the Plaintiffs are incorporated and have capacity to sue, cannot be taken advantage of by the Defendant, on this demurrer, because of his omission to specify this ground of objection to the complaint.

There is no force or meaning to language, or this omission to specify this ground of objection to the complaint operates as a waiver of the objection.

The 144th section recognizes six distinct grounds of demurrer to the complaint, and the 145th section declares that the demurrer shall distinctly specify the grounds of objection to the complaint, and the 148th section declares that if no such objection be taken the Defendant shall be deemed to have waived the same, except the objection to jurisdiction, and that the complaint does not state facts sufficient to constitute a cause of action.

The complaint states a good cause of action, and that the Plaintiffs have become the owners of it by a valid transfer thereof to them, but does omit to allege that the Plaintiffs are a corporation having capacity to sue.

This objection must, therefore, be regarded as waived.

It is just and reasonable that the rule should be so. If this objection to the complaint is well taken,, and the Defendant had specified this ground of demurrer, the Plaintiffs would most probably have amended their complaint, and inserted proper averments to show them a corporation having authority to sue.

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It is a question, to say the least, whether such an allegation in the complaint is necessary, and whether the statute does not relieve the Plaintiffs from alleging it, as it does from proving it, unless the Defendant set it up in his demurrer (2 R. S. 458, § 3).

The judgment of the Supreme Court must be reversed, and judgment given for the Plaintiffs on the demurrer, with leave to the Defendant to answer on the payment of the costs of the demurrer in this Court, and in the Supreme Court.

The language of section 172 seems to confine the power to allow the party to plead over, after a demurrer has been overruled, to the SupremeCourt. Its language is, that *"after the decision of a demurrer, either at a General or Special Term, the Court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead over upon such terms as may be just"* (Code, § 172).

This demurrer was sustained in the Supreme Court, and consequently that Court had no opportunity to exercise their discretion in this case, and it is the duty of this Court to give such judgment in this case as that Court should have given, and the power of this Court to give it on this appeal is not doubted.

As an Appellate Court, our duty is to give such a judgment as the Court below ought to have given, and the power of this Court to do it is ample and unquestionable. There is sufficient evidence of good faith in the Defendant, in interposing this demurrer, when it is borne in mind that the demurrer in this case was interposed after two decisions in the Supreme Court holding the Defendant not liable upon the facts stated in this complaint; and besides, the Supreme Court, both in Special and General Term, sustained this demurrer.

The Defendant must have leave to plead over.

All concur.

Judgment reversed, and Defendant has leave to plead over.

JOEL TIFFANY,
State Reporter.

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WILLIAM ARMITAGE, RESPONDENT, v. FRANK PULVER, WILLIAM W. PULVER, AND PETER PULVER, APPELLANTS.

Sureties—Several Obligations—Contribution—Form of Judgment.

It is not error to allow a Plaintiff any judgment to which, upon the allegations in the complaint and the proofs, he may be entitled, either in law or in equity.

The rights and obligations of sureties inter se are the same whether they are bound under one or several like obligations; and where there are several obligations, contribution between them is in proportion to the several penalties of their respective bonds.

APPEAL from judgment of the Supreme Court at General Term in the Fifth District, affirming a judgment for the Plaintiff, entered on the report of a referee.

In December, 1855, Delos Gary was appointed by Rufus Hawkins, the Sheriff of the county of Oswego, Under-Sheriff of the said county, the Sheriff requiring of him bonds to the amount of $20,000, conditioned for the due discharge of his duties as Under-Sheriff. With knowledge of this requirement, and to enable the said Gary to receive the office and its emoluments, the Plaintiff executed a bond, in the sum of $2,000, and the Defendants another bond, in the sum of $18,000, conditioned as aforesaid.

Through the neglect of the said Gary in the performance of his duties the Sheriff was charged, in an action brought against him, with the payment of $1,002.72, damages and costs, and thereupon brought his action upon the bond executed by the Plaintiff, and recovered judgment, upon which the Plaintiff

Judgment—Extent of Relief—Demand. 56 *St. Rep.* 58 (25 *N. Y. Supp.* 800).

Contribution. 15 *Misc.* 354 (72 *St. Rep.* 861; 37 *N. Y. Supp.* 881); 35 *Hun,* 385.

Joint Judgment—Payment by one—Effect. 34 *Misc.* 281 (69 *N. Y. Supp.* 614.)

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paid for damages and interest $1,052.92, with costs and Sheriff's fees.

This action was brought by the Plaintiff on the 24th of July, payment, as co-securities for the performance by the said Gary of his duties as Under-Sheriff.

The complaint alleges these facts, and the insolvency of Gary, and prayed that the Defendants be adjudged to contribute and pay to the Plaintiff $981.24—i. e., nine-tenths of the sum so paid by the Plaintiff, with interest.

The answer denied many of the facts alleged, and insisted that Plaintiff's bond was a primary security for the Defendant's indemnity, as well as for the indemnity of the Sheriff, and that the Defendants were not liable until the amount of the bond given by the Plaintiff was exhausted.

The action was referred, and on trial thereof the referee found the facts in substance above recited, and that both bonds were delivered to the Sheriff, at the same time, by Gary, as security for the faithful performance of his duty; and also found that "in January, 1859, there were other claims to a large amount against Hawkins, as Sheriff, growing out of the acts and alleged defaults of Gary as Under-Sheriff; that some of these have been disposed of without damage to the Sheriff; some are supposed to have been paid by the Defendants, but the evidence does not disclose the precise amount paid, or determine their liability to pay; and some claims are still outstanding." But the referee did not sustain the allegation in the answer, that the Plaintiff's bond was given as a primary security, intended for the protection of the Defendants as well as an indemnity to the Sheriff.

The referee held and decided, as matter of law, that the two bonds were held as security for the same purpose and liability, and that the sureties are liable to contribute to the payment of the liabilities insurred by the default of Gary; and that an action can be brought whenever one entire claim has been paid by one of them; and further, that the Plaintiff and Defendants are liable to contribute in proportion to the amount of their re-

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spective bonds—that is, the Plaintiff is liable to pay (contribute) two-twentieths, and the Defendants eighteen-twentieths of the total amount charged upon all of the sureties.

He accordingly awarded to the Plaintiff eighteen-twentieths of the amount paid by him, and judgment was entered against the Defendants jointly.

The General Term required the Plaintiff to abate certain sums, included in the judgment, for costs, and the judgment was affirmed for the balance.

The Defendants appealed.

WOODRUFF, J.—The grounds upon which the Appellants seek to reverse the judgment in this action are:

First. That it is "an action at law," and cannot be maintained, because

I. The Plaintiff has not yet paid the sum assumed by him, and there are still outstanding claims against the Sheriff, which Gary's sureties may hereafter be required to pay.

II. The Plaintiff and the Defendants were bound by different bonds, and in distinct and several penalties.

III. The Plaintiff cannot recover in an action at law against the Defendants jointly; and

Second. If the action be regarded as an equitable action, it is prematurely brought, other claims being outstanding to which the sureties may be liable.

Third, The Plaintiff should bear one-fourth of the whole burden, to the sum of $8,000—i. e., until he had paid one-fourth up to the amount of his bond, $2,000.

Fourth. If the action be equitable, still the Plaintiff was not entitled to a judgment against the Defendants jointly. This enables him to collect the whole from one Defendant, and drives him to another action for contribution.

The counsel for the Appellants stated, also, that one of the Defendants has become insolvent; but no such fact appears in the allegation of the parties, and no such fact appears in the findings of the referee.

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In the face of an express statute, providing that, where the Defendants appear and answer, the Court may grant the Plaintiff *any* relief consistent with the case made by the complaint, and embraced within the issue (Code, § 275), it is not error to allow the Plaintiff any judgment to which, upon the allegations and proof, he is entitled either at law or in equity. It may be conceded that, by abrogating the distinction in the form of the action, the Legislature has not, and could not, under the constitution, deprive a party of the right of trial by jury "in cases in which it has been hertofore used;" but where the facts alleged and proved, entitle the Plaintiff to equitable relief, and no question has arisen touching the mode of trial, a referee to whom the trial of an action, whether legal or equitable, may be lawfully referred, is bound, in obedience to the above quoted section (§ 275), to grant the Plaintiff any relief, whether legal or equitable, to which, upon the allegations and proofs, he is entitled.

The questions, therefore, are, whether the Plaintiff was, at the time this action was brought, entitled to any contribution from the Defendants? And if so, in what proportion? And should the judgment be reversed because it is in force against the three Defendants jointly for a gross sum?

There are no special circumstances found by the referee, indicating that the bond given by the Defendants was given at the solicitation, or for the accomodation of the Plaintiff, or upon any consideration arising between the Plaintiff and the Defendants, creating an equity in their favor to be protected from contribution, nor any facts indicating that the bond of the Defendant was intended as a subsidiary security, and the other, as between those parties, the primary security, to operate pro tanto for the Defendants' protection. Some claims of this kind were set up in the answer, but no facts appear to have been proved warranting such claims.

The general doctrine that there existed, from the moment of the delivery of these bonds, an equitable right to contribution, in case a liability should arise against all the sureties if one

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only should be compelled to pay, is therefore directly applicable, unless the fact that the parties were bound by separate bonds, in different penalties, per se changes their relations to each other in this respect.

That one of two or more sureties for a common principal, who has been compelled to pay the whole, or more than his just proportion of the sum for which all were bound, may compel the others to contribute their just shares of what he has so paid, is not, and cannot, at this day, be denied.

That the rights and obligations of the sureties, inter sese, are the same, whether they are bound under one or several like obligations for the same principal, and for the same debt or duty, is stated by Mr. Justice Story (Eq. Jur. § 495); and where there are several distinct bonds, with different penalties, contribution between the sureties is in proportion to the penalties of their respective bonds (§ 497), is also stated. He refers to the opinion of Lord Chief Baron Eyre, in the English Exchequer (Deering *v.* the Earl of Winchelsea, 2 Bos. and Pul. 270), in which he says: "They are bound as effectually quoad contribution, as if bound in one instrument, with this difference only, that the sums in each instrument ascertain the proportions, whereas, if they were all joined in the same engagement, they must all contribute equally."

Lord Eldon, in Mayhew *v.* Crickett et al. (2 Swanst. 198), says: "Although at one time the doctrine prevailed, that where there were separate securities there should be no contribution, that has been exploded ever since the case of Deering *v.* Lord Winchelsea;" and again (p. 201), referring to that case: "Having myself been counsel against that doctrine, I was much dissatisfied with it; but on further and maturer consideration, I ought to make so much amends as to say, that I am convinced it was right."

This case of Deering *v.* Lord Winchelsea is a leading case on the subject. It rests the right of contribution upon the principles of natural justice and equity, and not upon any ground of implied or presumed contract between the sureties;

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and hence the case has since been followed, and applied to cases in which some of the sureties became such without knowledge that the others were bound, and to cases in which the suretyship of some was entered into subsequently to that of the others—always, however, provided the obligations were for the same debt or duty, and were not other and distinct transactions, and where it did not appear that one was intended to be secondary or collateral to the other. (See Norton *v.* Coons, 3 Denio, 130; Warner *v.* Price, 3 Wend. 397; Barry *v.* Ransom, 2 Kern. 462, 466).

I have not been able to find a case in which the rule, as stated by Ch.B. Eyre, has been since that time denied.

It is true, that in the case itself, as reported, the sureties appear to have been bound in equal sums; but as a statement of a rule of equity, in a case very often referred to with approbation, it is entitled to be regarded as high authority.

Hon. Justice Redfield, in the 8th edition of Story's Equity Jurisprudence, has added a section (number 497*a*) not very intelligible in the connection in which it is found; and the counsel for the Appellants, in the present case, has cited it as an intimation of dissent from the doctrine, that where the sureties are bound in different sums, their contributions should be in like relative proportion. The interpolated section does not bear such a construction. It questions "whether the more recent decisions in Courts of Equity justify any such discrimination between sureties for the same debt, by different bonds, with different sums as penalties, unless where the purpose of the different sums in which the sureties are bound is, to show that the *obligor incurs the hazard of only a portion of the debt,* or a portion of what the other sureties assume."

That is to say, where the instruments show that each surety became bound for the whole debt, the circumstance that the penalties of the bond were unequal, might not affect the rate of contribution. He cites no new authority, but his note to the section shows that his meaning is as last suggested. Citing Deering *v.* Lord Winchelsea, he says: "This was the case

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which first decided that contribution among sureties is not matter of contract, but of general equity, on the ground of equality of burden and benefit. We infer, therefore, that the difference between the penalties of the bonds will make no difference, *provided* each exceed the debt, or the purpose of each is to bind all the sureties to the extent of the whole debt."

The converse of this supposed qualification is, that where the penalties are less than the whole debt, or the purpose is not to bind all the sureties to the extent of the whole debt, actual or contingent, the contribution will be proportioned to the burden assumed by each—i. e., pro rata.

That is the present case. Each assumed a part, and only a part, of the responsibility, and they should share whatever is lost thereby in the proportion in which they took the hazard of the aggregate whole.

The notes to the case of Deering *v.* Winchelsea, in White's Leading Cases in Equity (vol. 1, pp. 60 to 71), with American Notes, in the Law Library edition (vol. 49, N. S. pp. 78 to 104), contain a full collection of authorities bearing upon this subject, many of which are from this State.

I regard the rule as well warranted by authority, and just and right in itself, which holds the parties before us to contribute in the proportion in which they became bound to the Sheriff.

It remains to inquire whether the action must be held to be prematurely brought, because the referee has found that "some claims are still outstanding" against the Sheriff, "growing out of the acts and alleged defaults of Gary, as Under-Sheriff."

1st. No such defence is set up in the answer of the Defendants; and therefore no such defence was available to them at the trial.

2. As to such claims as the referee finds had "been disposed of without damage to the Sheriff," the sureties were no longer in any peril; as to such as "are supposed to have been paid

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by the Defendants," the silence of the answer on the subject is conclusive that they constitute no ground of defence whatever. And as to some claims not shown to have any validity, resting alone in "alleged" default of Gary, of which there was no proof satisfactory to the referee, they are not proved or found to be obligations for which the principal, Gary, is liable, and therefore are not shown to be within the obligation of the bonds.

It is, therefore, not necessary to discuss the question whether, if it had been alleged as a defence, and had been proved on the trial, that the principal had been guilty of acts or defaults for which he was liable to the Sheriff, that proof would have availed to defeat the Plaintiff's action as premature.

But I am not satisfied that the Plaintiff was entitled to a judgment against the Defendants jointly, upon which he may collect the whole amount from one only. The Plaintiff's action, and the judgment in his favor, is sustained as an equitable action for contribution. The proper judgment or decree in such case should determine the sums which the several Defendants are bound to contribute.

Had it appeared that the Defendants made any such claim, or had on the trial insisted upon any apportionment of the amount due by them, or called the attention of the referee to the subject, the general exception taken to his conclusion, that the Plaintiff was entitled to judgment against the Defendants for the sum found by him, should prevail. But having in no wise raised the question below, I think the judgment should be affirmed.

All affirm, except GROVER, J., who thought the judgment should be reversed because rendered against the Defendants jointly.

JOEL TIFFANY,
State Reporter.

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OBEDIAH W. CANDEE AND HENRY D DENISON *v.* HOLLOWAY G. HAYWOOD.

Title—Lands sold by State—Redemption.

Where lands have been sold by the State Engineer on behalf of the State, the original purchaser has three months after the sale within which he may acquire title by redeeming the lands from a purchaser at such sale, when it is purchased by any one other than the State; and he may also redeem from the State, when bid in by it, by paying within that time the amount for which it was so purchased. But after the three months have elapsed, the State Engineer may sell to any person, and the right to redeem by the original purchaser ceases.

A. J. Parker for Respondents.

GROVER, J.—No exception was taken to the legal conclusion of the referee, that the lands, for the recovery of which this action was brought, had become liable to resale by the State, by reason of the non-payment of the residue of the purchase-money agreed to be paid therefor by Barnes and Phelps, to whom a certificate for said lands was issued April 10th, 1852, pursuant to the statute; nor the findings of facts upon which such conclusion was based. The only question as to the resolution of the Commissioners of the Land-office, directing a resale of the lands, is, whether it was regularly passed, pursuant to statute. That fact was proved. Whether it was introduced and moved by the Lieutenant-Governor, while presiding at the board, or whether, while so presiding, it was in order for him to make a motion, is wholly immaterial.

Remedy—Statutory—Cumulative. 154 *N. Y.* 416.

Contract—Illegal—Enforcement—Punitory enactments as effecting. 8 *Misc.* 208 (58 *St. Rep.* 841; 28 *N. Y. Supp.* 533); 2 *How. N. S.* 340.

Lands sold by state—Title—Resale—Notice. 34 *N. Y.* 314.

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nated by the board for the publication of the notice of resale. That designation was "The Central City Courier." The paper

The paper in the county of Onondaga was sufficiently desig-

which published the notice, upon the first page was named "Central City Courier." It thus appears that the paper the second page, and in the local column, on the third page, "Central City Daily Courier." It thus appears that the paper was used and was known by both names. Besides, it was proved that there was no other paper printed in the county of any similar name.

These facts left no doubt but that the paper in question was the one intended to be designated by the board. This was all that was requisite. It is claimed by the Appellant's counsel that the holder of the certificate issued to Barnes and Phelps was entitled to redeem the land from Denison, at any time within three months after its purchase from the State by him, and the issuing of letters-patent to him therefor.

If the counsel is right in this, the judgment appealed from is erroneous, as the facts found show that all was done by such holder necessary to redeem within that time, if such right existed. From the facts found, it appears that at the public sale of lands, conducted by the State-Engineer on behalf of the State, pursuant to the statute and the instructions of the Commissioners, no one bid for the lot in question the minimum price fixed thereon by the Commissioners, according to the statute, and it was, therefore, according to statute, bid in for the State. That after the lapse of more than three months from such purchase by the State, the State sold the land to the Plaintiff Denison, and issued letters-patent to him therefor—no application having been made in the meantime to purchase the same by the holder of the certificate. Section 55, p. 549, vol. 1, R. S., provides that the original purchaser of any land so resold by the State-Engineer, his heirs or assigns, may redeem the same at any time within three months after such sale. This evidently refers to a sale made pursuant to section 53. Section 54 provides that on every such resale the State-

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Engineer shall give a certificate to the effect, among other things, that the lands are subject to redemption, pursuant to the act, and that in case of redemption the sale shall be void and of no effect. Section 61 provides that the State-Engineer may sell lands purchased by him for the State, pursuant to the act, to any person who may apply to purchase the same; always giving a preference to the last owner, provided he shall apply to purchase the same within three months after the sale, for the amount at which the same was purchased for the State. It will thus be seen that the original purchaser has three months after the sale during which he may acquire title to the lands, by redeeming from a purchaser within that time, when it is purchased by any one other than the State; and, when bid in for the latter, by paying to the State, within that time, the amount for which it was so purchased.

It will be seen that this preference to the former owner effectually suspends the power of the State-Engineer to sell any one other than such original purchaser, during the time such purchaser has the preference; otherwise, such preference would be rendered nugatory. After the expiration of three months from the sale of this preference ceases, and the State-Engineer is at liberty to sell to any one who may wish to purchase.

In the event of such sale, the statute is entirely silent as to any right of the original purchaser to redeem therefrom. No such right is required to be specified in the certificate of sale. In short, no such right exists, and the holder of the original certificate acquires no right by his attempted redemption from the sale to Denison. Section 65, p. 550, provides that whenever the Commissioners direct a relase pursuant to the act, they shall cause notice to be given to every occupant of such land to remove therefrom; and that, together with the two succeeding sections, provides a summary mode of removing such occupants in case of neglect or refusal to comply with such notice. It is manifest that a compliance with these provisions by the Commissioners is not made a condition prece-

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dent to the power of sale, and that the validity of the sale is not dependent upon a compliance therewith. There is nothing in these sections including such an intention. The design of the Legislature was merely to furnish to the Commissioners a remedy for the speedy removal of the occupants from the land, and not to require notice to those interested, to enable them to protect their interest.

It is further insisted that the above mode provided for the removal of the occupants by the Commissioners must be pursued, and that, therefore, an action for the recovery of possession cannot be maintained. There is nothing in the statute making the remedy provided exclusive. When the common law gives a remedy, and another remedy is provided by statute, the latter is commulative, unless made exclusive by the statute (Wetmore *v.* Tracy, 14 Wend. 250, and cases cited). It is claimed that the Plaintiffs failed to show title, for the reason that the land was held adversely at the time Denison received the patent therefor from the State.

There are two answers to this—First, section 160, p. 149, 2 R. S., does not apply to the State. Second, the land was not held adversely to the State.

It is found that the occupants held under the original purchaser from the State. That was not a holding under an adverse title within the meaning of the above section (Webb *v.* Bindon, 21 Wend. 99; Cook *v.* Travis, 20 N. Y. 400).

The judgment appealed from must be affirmed, with costs.

All affirm.

JOEL TIFFANY,
State Reporter.

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BINGHAM, RECEIVER, &c., *v.* DISBROW AND OTHERS.

Practice—Supplementary Proceedings—Transcript of Judgment—Execution —Residence of Judgment-Debtor—Husband and Wife—Witness.

CLERKE, J.—This is an action brought by a receiver, appointed under supplementary proceedings, to set aside an alleged fraudulent assignment made by the judgment-debtor. Stephen R. Disbrow, a brother of the judgment-debtor, died in November, 1855, intestate, leaving property, to a distributive share of which the latter was entitled, amounting to $2,-653.19.

On the 22d of December, 1855, he assigned his interest in the personal estate of the intestate to William Strang, his brother-in-law, for $900, for which Strang gave his promissory notes.

Subsequently, on or about the 28th of February, 1856, three promissory notes which he had given to Disbrow. These brow's wife, receiving from her, as the sole consideration, the Strang assigned the interest thus assigned by Disbrow to Disare the assignments which this action is brought to set aside.

It was contended at the trial, and before the General Term, that the proceedings supplemental to execution were insufficient, as it did not appear by the affidavit, on which the order was founded, that a transcript of the judgment had been filed in Tompkins county, to the Sheriff of which county the execution had been issued. This is not required by section 292 of the Code of Procedure; it merely requires proof that an execution had been issued to the Sheriff of the county "where the judgment-debtor resides," and that it had been returned unsatisfied.

This is sufficient to give the Judge jurisdiction. It is also contended that, as the Defendant afterwards removed to Cayuga county, the order for his examination could not be granted, without having issued another execution to the Sheriff of that county.

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The first part of the section requires that an execution should have been issued to the Sheriff of the county where the Defendant resided at the time of issuing the execution; and undoubtedly, it also provides that he should appear at a time and place within the county in which the execution was issued.

The section does not expressly refer to cases which show, that after the issuing and return of the execution, the Defendant removed to another county.

Undoubtedly, the power given by this section being merely a statute authority, unless the facts necessary to bring the case within the section are proved, the Judge has no jurisdiction; and the mere appearance of the judgment-debtor, and his examination without objection, do not confer jurisdiction.

But all that the section expressly requires in reference to the issuing and return of an execution is, that one should be issued and returned to the county where, at the time of issuing it, the judgment-debtor resides, or has a place of business. It does not require that, if he should afterward remove to another county, another execution should be issued and returned unsatisfied.

In the absence of any express provision in such a contingency, it is fairly to be presumed that the Legislature did not intend to alter the practice in relation to creditors' bills; and it has been frequently decided, that as supplementary proceedings are a substitute, to some extent, for creditors' bills, the rules settled in reference to the proceeding under the bills may be regarded as controlling, when not altered by the Code of Procedure, or the practice under it.

Now, in a creditors' bill, it was only necessary to allege that an execution on that judgment had been issued to the county in which the judgment-debtor resided at the time it was issued. If he had removed to another county, it was not necessary to allege that a second execution had been issued to that county; and it would have been no defence for the Defendant, in the creditors' bill, to set up the removal and the omission to issue the new execution. In the case before us, all that the sec-

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tion (292) requires, and all that was necessary to maintain a creditors' bill, was shown when the order was granted requiring the Defendant to appear before a Judge in Cayuga county—being the county in which he resided at that time.

I hold, therefore, it is only necessary that an execution should have been issued, either to the county where the Defendant formerly resided, or the county in which he was residing at the date of the order. In no case is it necessary to issue more than one.

The affidavit in this case shows that the Defendant has property, which he refused to apply towards the satisfaction of the judgment; and this, together with the allegation that a judgment had been recovered, and an execution issued to the county in which the Defendant formerly resided, was all that was necessary to entitle the Plaintiff to the order which was issued.

The Special Term found, as matter of fact, that the assignment to Strang, and the subsequent assignment by Strang to Disbrow's wife, were made without any valuable consideration, and were made and accepted with the intent to hinder and delay the Plaintiff in the judgment, and to prevent him from collecting it.

This finding is conclusive here .The only question, therefore, that remains is, whether Mrs. Disbrow was a competent witness in the cause.

It is not contended that, at the time of the trial (April, 1859), she could have been a witness on behalf of her husband; but it is contended, as she was a co-Defendant, and claimed an interest in the subject of the action, totally different and distinct from that of her husband, that she was a competent witness on her own behalf; and undoubtedly the weight of authority is in favor of this proposition (Barton *v.* Gledhill, 12 Abb. 246; Shoemaker *v.* McKee, 19 How. 86; Marsh *v.* Potter, 30 Barb. 506; Babbott *v.* Thomas, 31 Barb. 277; Schaffner *v.* Reuter, 37 Barb. 44; Hooper *v.* Hooper, 43 Barb. 292).

The question, I believe, has never been decided by this

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Court, but the ground upon which the rule was placed in these several cases is, I think, incontrovertible; and that is, that section 399 of the Code of Procedure is sufficiently comprehensive to authorize the wife or husband to be a witness in his or her own behalf, whether they are co-Plaintiffs or co-Defendants.

They are not within the exceptions contained in that section; and there is no prohibition in any part of the Code forbidding the husband or wife from being a witness in his or her behalf, when joined as Plaintiffs or Defendants.

When the Legislature enacted that a party to an action or proceedings may be examined as a witness in his own behalf, the same as any other witness, without any qualification or restriction relative to the evidence of husband or wife in such case, it must be presumed that no such exception was contemplated.

Most of the decisions to which I have referred were in actions brought to set aside deeds or assignments made by the husband to the wife, on the ground of fraud; and the wife's evidence was offered, or introduced, for the purpose of confuting the imputation of fraud.

In none of these cases, as in this, could the evidence enure to the benefit of the other Plaintiff or Defendant.

Here, the wife alleges that the assignment was for a valid consideration, consisting of eleven hundred dollars, which she had received as one of the next of kin of a deceased relative, or, in the language of the answer, which she became possessed of by "descent."

On principle, I consider the decisions to which I have referred correct.

It cannot be pretended that the Legislature designed, by section 399 of the Code of Procedure, to admit parties to an action to be examined as witnesses who, before its adoption, were incompetent to testify in any action or proceeding.

For instance, persons convicted of felony were and are incompetent to testify under any circumstances, or to any

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extent. Of course, section 399 had not the effect of restoring their competency. But can it be said that married women were incompetent, generally, as witnesses in actions or proceedings?

The law placed them under no such disqualification.

It would be preposterous if it did. Marriage is not felony; the law has never presumed that the person who has committed matrimony is not worthy of belief.

The only difference which the law made between married persons and others, as witnesses, was that the former were incompetent to testify for or against their respective husbands or wives.

In all other respects, of course, there was no difference.

And as to their capacity to testify as parties in an action or proceeding, they were no better or worse than others in that respect.

All parties to an action were alike incompetent.

But when the disability of parties to an action was removed, it made all capable who were incapable of being witnesses before, and removed all restrictions, except those that had expressly existed at the time of the adoption of the section.

In reference to felons, the restriction remained; in reference to married persons, the particular restriction in relation to them also remained—namely, that they could not testify for or against their respective husbands or wives.

By this section, then, when they were parties to an action, they became as capable as any other parties of testifying on their own behalf.

In this case the evidence of Mrs. Disbrow could have no direct effect for or against her husband.

She was offered solely for the purpose of showing that the assignment was given to secure a loan which she had made to her husband, and that the assignment was founded on a bonâ fide consideration.

If the assignment was upheld, it would satisfy his indebtedness to her; if set aside, it would satisfy the judgment-creditors'

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claim against him, so that his interest in the result was clearly balanced.

This, I think, would take her testimony out of the rule excluding the testimony of husband and wife for or against each other.

It has always been the rule that a wife may be a witness in an action between third persons, not directly affecting the interest of the husband, though her evidence may possibly expose him to a legal demand; as, in an action between third persons, for goods sold and delivered, to prove that the goods had been sold, not on the credit of the Defendant, but on her husband's credit (1 Phillips on Evidence, p. 87 ed. 1839, and cases there cited.)

When we consider the reason of the rule for excluding the husband and wife from testifying, either for or against each other, it will be very obvious that it does not apply to a case in which the wife, as a party in the action, offers to testify in her own behalf, and claims the benefit of section 399 of the Code of Procedure, in a case like the present.

The rule is founded partly on a principle of public policy, which deems it necessary to guard the security and confidence of domestic life, even at the risk of an occasional failure of justice.

The first reason evidently has no longer any existence, either here or in England. Interest has not been a ground of incompetency for many years; and as to the other reason, it would be absurd to say that the testimony of a wife, in her own favor, in an action in which she is a party, contending for her alleged individual rights, could impair the security and confidence of her domestic life.

We all know, from our experience of the domestic relations in Anglo-Saxon countries, that the identity of the interests of husband and wife, in most instances, still morally exists, as it has always existed; and as long as interest was a ground for excluding the testimony of all persons, the law was perfectly

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consistent with itself in excluding the testimony of husband and wife in behalf of each other.

But when the objection as to interest was removed, the other reason of the rule, founded on the apprehension of danger to the security and confidence of domestic life, fell with it.

While we recognize the identity of interest morally between husband and wife, every accession to the property of the one must be beneficial and pleasing to the other, and would therefore be more likely to produce harmony, rather than discord, between them.

For all these reasons, I conclude that there was no good legal cause for excluding the testimony of Mrs. Disbrow on the trial of this action.

Although the judgment was reversed, yet a majority of the Judges did not agree upon the grounds of reversal; so no principle is settled by it.

JOEL TIFFANY,
State Reporter.

ELIZABETH V. HENRY, APPELLANT, *v.* CHARLES WILKES, RESPONDENT.

Principal and Agent—Fraudulent Representation—Implied Obligation—Evidence—Production of Books and Papers.

Where a party who is bound to pay an outstanding mortgage on Defendant's land obtains the money by fraudulent representations and discharges the mortgage, the Defendant, who was neither party nor privy to the transaction, is not liable to the person furnishing the money, even though the discharge of the mortgage inures to his benefit.

APPEAL from the judgment of the Supreme Court in the First Judicial District, affirming a judgment entered upon the report of a referee. The action was brought to recover of the Defendant the sum of $2,080, alleged to have been loaned by Plaintiff's assignor, through her alleged agent, Henry Wilkes,

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Principal and agent—Fraud—Ratification. 50 *N. Y.* 700.

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to the Defendant, and to have been applied by said agent to pay off a mortgage on certain lands in New York City, the property of the Defendant, which, by an agreement between Henry Wilkes and the Defendant, was to be paid by the former.

The case was referred to a referee to hear and decide. The referee found in favor of the Defendant, and found as facts and conclusion of law:

That on or about the 28th January, 1847, Elizabeth Henry, mentioned in the complaint, advanced and paid to one Henry Wilkes, claiming to act as the agent for the Defendant, the sum of two thousand and eighty dollars ($2,080). That said Henry Wilkes had no authority to receive or borrow the said sum of money for the Defendant, and that the Defendant never requested the advance of such sum or any part thereof, nor sanctioned or ratified such advance, or the request of Henry Wilkes, that the said Elizabeth Henry advance the said sum of money to the Defendant. That the said Henry Wilkes used and applied the said sum of money with the knowledge of the said Elizabeth Henry, but without the request or knowledge of the Defendant, for the purpose of paying off a mortgage on certain lands and premises in the city of New York, belonging to the Defendant. That the said Henry Wilkes, by reason of a valid agreement between him and the Defendant, had assumed and was bound to pay the said mortgage, and, in paying the same, paid his own debt. That the said Henry Wilkes paid to the said Elizabeth Henry, in two several payments, out of funds of the Defendant, the sum of one hundred and forty-five dollars, as and for the interest on the said sum of two thousand and eighty dollars, claimed to have been advanced by the said Elizabeth Henry to the Defendant; but that such payments were never authorized or ratified by the Defendant. That the said Defendant has not paid to the said Elizabeth Henry the said sum of two thousand and eighty dollars, or any part thereof, or any part of the interest thereon. And that, at the time in that behalf mentioned in the complaint, the said Elizabeth Henry executed and deliv-

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ered to the Plaintiff the assignment in the complaint mentioned.

And did further find and report, as matter of law, that the said Defendant is not indebted to the said Plaintiff, in any manner or form, by reason of the matters and things in said complaint alleged. And also found, as a conclusion of law and decision upon the facts thereinbefore found, that the said Defendant have judgment against the said Plaintiff for his costs and disbursements. The Plaintiff duly excepted to the report of the referee, and to his findings.

Various objections were taken to the admission of evidence, which sufficiently appear in the opinion.

The Plaintiff appealed to the General Term of the Supreme Court, where the judgment was affirmed, and afterwards appealed to this Court.

Lyman Tremain for Appellant.
Amasa J. Parker for Respondent.

MILLER, J.—It has been held in numerous cases that the finding of a referee upon questions of fact presented upon a trial cannot be reviewed in this Court (Macy *v.* Wheeler, 30 Y. 231; Young *v.* Davis, 30 N. Y. 134; Sanford *v.* Eighth Av. R. R. Co., 23 N. Y. 343; Hoyt *v.* Thompson, 19 N. Y. 207, 212; Oldfield *v.* N. Y. & H. R. R. Co., 14 N. Y. 310).

We cannot therefore examine the facts determined in the subordinate Courts, if they are covered by the finding of the referee. It is claimed, however, that the referee does not find against the Plaintiff, as to the fact that the Defendant had the benefit of the money loaned to Henry Wilkes, and therefore he is liable to account for it to the Plaintiff. The money was applied to the payment of a mortgage upon the Defendant's real estate, but it being received by another party, and applied by him in the payment of a debt which that party was bound to pay, it does not necessarily follow that the Plaintiff can maintain an action to recover it of the Defendant; the finding of the referee, that Henry Wilkes, claiming to act as the agent of the Defendant, obtained the loan and applied the money to pay an

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incumbrance upon the Defendant's land, which Henry was bound to cancel, does not, of itself, necessarily and absolutely raise an obligation upon the part of the Defendant to refund the money because he was benefitted by the discharge of the mortgage. The Defendant was a stranger to the transaction, and had no participation in it. The money was not paid to him, but to Henry Wilkes, and he had no knowledge in regard to it at the time it was obtained, or when it was appropriated. The mortgage was cancelled without his privity or procurement, and the money used in procuring its satisfaction was never received by the Defendant at all. So long as Henry Wilkes was obligated to pay the mortgage, it was of no consequence to the Defendant of whom he obtained the money, provided he acted without the authority or knowledge of the Defendant. Nor was the Defendant under any obligation to pay the demand because the money was obtained by a fraudulent misrepresentation, so long as he did not assent to it. The party procuring it was not, in any sense, his agent in the transaction, and the facts found do not present a case of money received by the Defendant in payment of an antecedent debt. They differ entirely from a case where goods are purchased fraudulently and pass into the hands of a bonâ fide creditor in payment of a pre-existing debt (Root *v.* French, 13 Wend. 570). In the latter case the party is prosecuted for the goods thus procured, and the proceeding is against the property, as well as the person who has it in possession. Here the money has been applied without the knowledge of the Defendant, and he has had no connection either with its procurement or its application. He was entirely innocent of any knowledge of the circumstances under which it was obtained, and the mortgage was discharged in accordance with an obligation by Henry Wilkes, without his instigation or request. It is difficult to see how there can be any relationship between the Defendant and the Plaintiff's assignor which imposes a legal liability upon the Defendant. I am not aware of any principle of law which authorizes this Court to adjudge that, without privity, possession of the property,

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knowledge of its being received, or any act showing connection with the matter, an implied obligation can arise against an innocent party which will sustain an action like the one now presented for our consideration. To do so, it seems to me, we would be obliged entirely to ignore the well-settled rule that, when one or two innocent persons must suffer from the fraud of a third, the one shall suffer who by indiscretion has enabled such third person to commit the fraud.

It is said that the referee erred in admitting evidence, upon the cross-examination of Henry Wilkes, of an agreement between him and the Defendant, that, as between them, Henry Wilkes was to pay the mortgage upon the Defendant's property.

I think that the testimony was competent for the purpose of showing that the money was paid for the benefit of Henry Wilkes, and to cancel an obligation he had assumed, as well as for the purpose of rebutting any presumption which might arise, from the facts proved, that Henry Wilkes had any authority from Charles Wilkes to borrow the money, or to appropriate it to the payment of the mortgage. The question in the case was, whether the money was loaned to Henry Wilkes or Charles Wilkes. To establish that it was loaned to the Defendant, the Plaintiff had proved that it was used for the purpose of paying off a mortgage upon the property belonging to the Defendant—thus primâ facie showing, in connection with the acts and declarations of Charles Wilkes, a liability on the part of the Defendant. These facts, I think, made it entirely competent to prove that, by the agreement between the parties, the mortgage was the debt of Henry Wilkes, and was to be paid by him, and not by the Defendant. The proof of the Plaintiff necessarily led to this inquiry, and opened the transactions between the parties; and the evidence introduced threw light upon the question in controversy; and even if it did not establish that no loan actually was made, yet, with conflicting and contradictory testimony as to the principal issue which was litigated upon the trial, it certainly had an important bearing

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upon the subject. For reasons of a similar character, and as a part of the transaction between Henry and Charles Wilkes, which had been opened by the Plaintiff's testimony, it was competent to prove mutual dealings between these parties.

The letter from the Defendant to Henry Wilkes was also evidence as to a portion of the transaction, and tended to establish that Henry Wilkes had acted without authority in making the loan. It was a portion of the correspondence between the Defendant and Henry Wilkes, and showed a state of facts irreconcilable with the idea that the Defendant ever gave any authority to Henry Wilkes to borrow the money for him.

It is insisted that the referee erred in allowing the Defendant to cross-examine the witness, Henry Wilkes, in regard to the papers in the suit brought by the Plaintiff against him to recover the same money for which this action was instituted, and as to the contents of the letters written by him to the Defendant, without first producing the papers and showing them to the witness. The witness denied making the statements in the papers, in the suit specifically asked about; no evidence was then introduced to show that he had; and the papers in the action were put in evidence in a subsequent stage of the case by the Plaintiff, when the same witness was again interrogated on the subject. The witness did not remember particularly as to the contents of these letters; and they were also introduced upon the examination of the Defendant. One of the reasons of the rule requiring the production of papers under such circumstances is, in order that the Court may be possessed of the whole; and if any error was committed by the referee, in his ruling, I think it was entirely obviated by the introduction of the papers afterwards. I do not see that any injury could result to the Plaintiff, in advantage to the Defendant, by their non-production at an earlier period.

I think that no error was committed by the referee, upon the trial of the case, and that the judgment should be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

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JAMES H. BACON *v.* JOSEPH I. BURNHAM.

Promissory Note—Second Endorser—Protest—Waiver.

Where a Defendant as endorser of a promissory note can only be made liable as a *second endorser,* no act of the first endorser, waiving notice of protest after the note has become due, can charge such second endorser.

A Plaintiff taking a promissory note after maturity is not a *bonâ fide holder,* and takes it subject to all equities, &c.

THIS action was brought against the Defendant as endorser upon a promissory note, made by Lewis Dunham to the order of T. H. Sweezey, dated Oct. 2, 1855, and payable in six months from date. On the back of the note there is a guarantee of collection, dated the 27th of October, 1855, and signed by Sweezy, and under this is written a waiver of protest, signed by Sweezey, but bearing no date, and then the name of the Defendant. The complaint contains two counts; the first upon the note simply, and averring an endorsement by Sweezey, and delivery by him to the Defendant, and his endorsement and delivery of the note to the Plaintiff. The second cause of action set forth in the complaint is a special count, averring facts by which it is sought to charge a liability upon the Defendant as a

Bills and notes—Indorsers—Second—Liability. 50 *N. Y.* 73; 51 *N. Y.* 48; 54 *N. Y.* 48; 59 *N. Y.* 481; 1 *Hun,* 633 (4 *T. & C.* 210); 66 *Hun,* 351 (50 *St. Rep.* 666; 21 *N. Y. Supp.* 506); 73 *Hun,* 517 (56 *St. Rep.* 165; 26 *N. Y. Supp.* 102); 40 *App. Div.* 536 (58 *N. Y. Supp.* 172); 83 *App. Div.* 143 (82 *N. Y. Supp.* 483; 13 *Ann. Cas..* 153); 2 *T. & C.* 421; 2 *Abb. N. C.* 80; 21 *Abb. N. C.* 153 (17 *St. Rep.* 843, 1 *N. Y. Supp.* 330); 3 *Misc.* 134 (51 *St. Rep.* 502; 22 *N. Y. Supp.* 694); 4 *Misc.* 83 (53 *St. Rep.* 70; 23 *N. Y. Supp.* 852); 14 *Misc.* 465 (72 *St. Rep.* 261; 36 *N. Y. Supp.* 1113); 16 *Misc.* 569 (74 *St. Rep.* 119; 38 *N. Y. Supp.* 778); 30 *Misc.* 726 (63 *N. Y. Supp.* 265); 30 *St. Rep.* 386 (9 *N. Y. Supp.* 628); 33 *St. Rep.* 846 (11 *N. Y. Supp.* 519); 36 *St. Rep.* 1001 (13 *N. Y. Supp.* 457); 38 *St. Rep.* 468 (13 *N. Y. Supp.* 798); 37 *Super Ct.* 205; 7 *Daly* 256; 2 *City Ct.* 53.

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guarantor of the note to Sweezey; but as no evidence was given under this count, no notice need be taken of it.

On the trial it appeared in evidence that one Kingsley bought the note of Sweezey, before maturity, and that when he first saw it, only the name of Defendant appeared upon the back. At this time Sweezey endorsed upon it the guarantee of collection, and nothing more. A suit was brought upon the note by Kingsley, after it fell due, against the maker and the Defendant, which seems to have failed, or been abandoned; and subsequently to this the second endorsement, containing a waiver of protest by Sweezey, was made and signed by him, and the note was then sold and transferred to the Plaintiff.

After the signature and protest, as against the Defendant, had been proved, and the other facts had been made to appear, the Defendant objected to reading the note in evidence, upon the ground that the Plaintiff, having taken the note after it fell due, held it subject to all equities existing against it; that when Kingsley took the note he was chargeable with notice; that the Defendant was and could only be made liable as second endorser; and the payee not having assumed the responsibility of first endorser, the Defendant was not liable as endorser of the note, nor could he be made liable by any act done, or endorsement made, after the note was past due.

These objections were overruled, and the Defendant subsequently made a motion to nonsuit the Plaintiff, on the same grounds, which was denied, and the Defendant excepted. No evidence being given by Defendant, a verdict was directed for the Plaintiff, for the amount of the note and interest, and the exceptions were ordered to be heard at the General Term, where the verdict was sustained, and judgment ordered thereon for the Plaintiff; from which judgment an appeal is taken to this Court.

J. H. Reynolds for Plaintiff.
W. F. Ramsay for Defendant.

BACON, J.—There appears to be a misconception, on the part of the Plaintiff's counsel, of the true import of the few

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facts disclosed upon the trial. He seems to assume, that nothing being shown upon the trial as to the time when the Plaintiff became the owner of the note, it may be taken for granted that he obtained it before maturity; or if not, that having received it from Kingsley, who did become the owner before maturity, the title of the Plaintiff can no more be impeached than that of Kingsley.

Now, while it is true that it is not shown at what particular date the Plaintiff obtained title to the note, it is very clear that it was after maturity, for it was not transferred to him until after a suit had been brought upon the note by Kingsley, and at that time Sweezey's name appeared upon it in no other character than as a guarantor for its collection. And if it be true that the title of the Plaintiff could no more be impeached than could that of Kingsley, this would not determine the question in controversy,—whether, under the facts which are here disclosed, Kingsley could himself maintain any suit against the Defendant as second endorser on this note.

In considering this case we are to remember that we are only concerned now with the cause of action set forth in the first count, and the proof made under it, since no attempt was made to prove any of the facts set up as the special cause of action in the second count.

The note is made payable to Sweezey, or his order, and being endorsed by the Defendant, the legal presumption from this simple fact (nothing appearing to show that he intended to assume any other character) is, that his responsibility was that of second endorser, with all the rights, and subject only to the liabilities of that position. It must be supposed, in the absence of any proof to the contrary, that, perceiving the name of the payee in the note, he endorsed it on the presumption that the name of such payee, to whose order it was made payable, would also at some time appear upon the note, for only thus could it become negotiable.

When the Defendant placed his name upon the note, he did so as a second endorser, with all the rights and responsibilities which attached and belonged to him in that character, and that

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assumed that he had or would have a responsible party before him.

The locality of the names was immaterial; and whether the name of Sweezey should appear above or below his own, or before or after his, in point of time, would not change in any respect his position as second endorser. As the case stood upon the trial, it is entirely clear that Sweezey could have maintained no suit on the note against the Defendant; and the case is brought directly within the authority of Herrick *v.* Carman (12 Johns. 159). That case was this: R., for value received, delivered his note to C., made by R., and payable to C. or order, and endorsed by H. in blank. C. afterwards sold the note to B., endorsing it also himself. In an action brought by B., as endorsee of the note, against H., it was held, that as C., the original payee, could not maintain an action against H., as endorser, neither could B. recover against him; affirming the principle, that where a first endorser cannot maintain an action against a subsequent endorser, no person deriving title under the first endorser, with knowledge of the facts, can recover against such subsequent endorser.

This case has been uniformly followed and approved in the Courts of this State (Seabury *v.* Hungerford, 2 Hill, 80; Ellis *v.* Brown, 6 Barb. 282; Moore *v.* Cross, 19 N. Y. 229).

The case at bar is stronger than the one cited, from the fact that there the name of C., the payee of the note, appeared as endorser before the transfer, while here, when Kingsley took the note, the name of Sweezey was not upon it except in a special character, under which alone he could be made liable, and not as endorser; and thus a liability was sought to be charged upon the Defendant which he had not assumed, and which could not be created by the transaction of placing the name of Sweezey upon the note after it had matured.

The rights of the Defendant must, on the clearest principles, be what they were when the note fell due; and as Kingsley took the note with only a guarantee, he was chargeable with notice of the legal rule, that this was not an endorsement, and was incapable of enforcement as such. The Plaintiff, taking the

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note after maturity, it is not a bonâ fide holder, within the commercial rule, which might otherwise protect him, but is subject to all the equities that existed in favor of the Defendant at the time the note passed into his possession.

In the opinion of the Court below it is said that, under the state of facts set out in the complaint, there is no doubt, if sustained by proof, the Plaintiff could recover, as indeed Sweezey could, under the authority of Moore *v.* Cross (19 N. Y. 227). But the difficulty is, that there was no proof offered to sustain this branch of the case, and until there was, the action stood simply upon the paper itself; and the rights of the parties were to be determined upon only the facts thus made to appear.

Upon another trial a very different question may possibly arise which need not, and indeed cannot, now be determined.

As the case now stands, I do not see how the Plaintiff was entitled to recover, and am of opinion that the judgment should be reversed, and a new trial granted, with costs to abide the event.

GROVER, J.—The first question for consideration in the case is, whether the Defendant would be made liable for the payment of the note in any other position than as second endorser to Sweezey, to whose order the note was made payable. No evidence was given as to the consideration or purpose for which the Defendant became endorser. The liability must be determined from the paper alone.

That he cannot be charged in any mode other than as endorser was settled in this State in Hall *v.*Newcomb (7 Hill, 416). The rule settled in this case was reasserted by this Court in Spies *v.* Gilmore (1 Com. 322), and has since been regarded as the law of the State.

The Defendant being liable only as endorser, can he be made so liable except as subsequent to Sweezey?

This question was substantially decided in Herrick *v.* Carman (10 Johnson, 224). In that case it was held that Herrick, who endorsed the note of one Ryan, payable to L. Carman & Co., or order, in the same way the Defendant endorsed the note

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in suit, was not liable thereon to the payees, and that subsequently the Plaaintiff, to whom the payees had endorsed the same for collection, could not recover. The same doctrine was reaffirmed by the Court in Herrick v. Carman (12 Johns. 159). This has been regarded as the law for more than half a century. A rule governing the rights of parties to commercial paper, of such standing, ought not to be changed by the Court. It follows that Sweezey, the payee, could not have maintained an action against the Defendant upon the note, had he been the owner at the time it became due. But the evidence shows that he was not such owner at that time, but that before it became due he transferred it to one Kingsley, accompanied by the following writing thereon, signed by him: "For value received, I hereby guarantee the collection of the within note of the maker and endorser, with costs of collection."

The express contract entered into by Sweezey, upon the transfer of the note, it is obvious, was all the obligation incurred by him. That made him the surety of the maker, and of the Defendant, to Kingsley, for the collection of the note. It did not make Sweezey surety to the Defendant for the payment of the note by the maker. Consequently, had the Defendant, upon default of the maker and the service of the proper notices to charge endorsers, voluntarily paid the note to Kingsley, he would have had no remedy against Sweezey upon the contract. But the note on its face showed that the Defendant had only agreed to assume the responsibility of endorser upon the contingency of Sweezey's becoming liable as first endorser. Kingsley knew this from the paper, and also knew that Sweezey had not thus become liable. He therefore was notified by the paper itself, that the contingency had not arrived which was a prerequisite to the liability of the Defendant. He could not recover, and therefore abandoned the suit brought by him against the Defendant for the recovery of the note, procured the endorsement of Sweezey, waiving demand and notice, and transferred the note to the Plaintiff. But this endorsement was made and the note transferred to Plaintiff long after it became due.

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The Plaintiff was not therefore a bonâ fide holder, and took it subject to any defence that was available against Kingsley at the time of the transfer. The question, then, is whether, if the Defendant was not liable at the time the note became due, he could be so made by any subsequent endorsement of Sweezey.

Had Sweezey endorsed and negotiated the note before maturity, and the Defendant had been charged with its payment in behalf of any bonâ fide holder, he would have had the right at once to pay the holder, and proced against Sweezey to recover his indemnity. Any act of the holder suspending this right would have discharged the Defendant.

For the same reasons, any omissions to perfect this right, so that it was in full force at the time of maturity, would have the like effect. If the parties, by the endorsement of Sweezey after the note became due, could thereby create a liability against the Defendant, they could do the same thing at any time within six years from that time, the Defendant having no right in the mean time to take any steps for his protection.

This was not the contract into which the Defendant entered. That was to become liable as second endorser, with Sweezey as first, with all the rights incident thereto. He was not liable upon the proof given, in which there was no conflict. The motion for a nonsuit should have been granted. Upon a second trial proof may be given bringing the case within the principle of Moore *v.* Cross (19 N. Y. 227). In that event the Plaintiff will entitle himself to a recovery.

The judgment appealed from should be reversed, and a new trial ordered, costs to abide events.

All concur.

Reversed.

JOEL TIFFANY,
State Reporter.

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JAMES R. WOLFKEIL, *v.* THE SIXTH AVENUE RAILROAD COMPANY.

Conflict of Evidence—Negligence—Question for Jury.

On an issue of negligence, it is a matter of right on the part of the Plaintiff to have the facts submitted to a jury, where there is conflicting evidence on the question of negligence, or where the fact of negligence is to be inferred from a variety of circumstances.

The fact that an intelligent Judge, who tried the case, regarded it as within the above rule, is to the Appellate Court some evidence that it was a question for the jury.

MASON, J.—The Appellant presents a single question in this case for the consideration of this Court, and that is, whether the Judge upon the trial was justified in submitting the question of negligence to the jury?

The Defendants claim that he was not, but on the contrary, should have nonsuited the Plaintiff.

In actions of this kind the negligence of the Defendants is the gist of the action; but the absence of negligence on the part of the Plaintiff is essential to the maintenance of the action.

The first question to be considered in this case is, whether, upon the evidence in the case, the driver of this car was guilty of negligence, to the injury of the Plaintiff.

The undisputed evidence in the case shows that the Plaintiff and the witness Benson were coming down Twenty-ninth street, from towards Broadway, to the Sixth Avenue, to take a car on their way down to Bleecker street. This was in August, 1859, and between nine and ten o'clock in the evening. As they approached the Sixth Avenue, they saw a one-horse

Highways—Objects in—Frightening teams. 71 *Hun,* 434 (54 *St. Rep.* 531; 24 *N. Y. Supp.* 980).

Negligence—Conflict of evidence—Question of fact. 83 *N. Y.* 574; 8 *Abb. N. C.* 210; 1 *Sweeny,* 542, 573.

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car going down, and Benson hailed the car, and it stopped, and they being one or two doors from the Avenue, hastened to get on. These men, Benson and the Plaintiff, were in company and together.

Benson got upon the front seat of the car, and the Plaintiff, in attempting to follow, and while in the act of getting on, was injured by the wheel of the car running over his foot and smashing it badly.

The evidence shows that there are seats outside and in front upon these one-horse cars, upon which the Defendants are accustomed to receive passengers, and allow them to ride.

The evidence on the part of the Plaintiff tended to show that the car was standing still when Benson got on, and when the Plaintiff started to get up, and that it started after he had got partly up.

The driver swears that he did not hear Benson hail the car, and yet the fact that he did hear it is abundantly proved; and there is a singular coincidence between the hailing of the car by Benson, and the stopping of it by the driver long enough for Benson and the Plaintiff to pass two doors on Twenty-ninth street, and for Benson to have time to get on the car before it started.

The jury might very well have said that this coincidence was stronger that the driver did hear Benson hail the car, than the driver's statement that he did not hear him.

Now, the first the driver claims to know anything of Benson was when he got up on the front of the car by him, and the first that he claims to know anything about the Plaintiff was after he was run over. Now this may be true, but I strongly suspect that the jury have found it not to be true. The driver himself says, that when he felt the jar of the car, he said to Benson, "*Was there a friend of yours with you?*

This is, to my mind, very insignificant evidence in the case. Why should this driver, just as he felt the jar of this car running over something, inquire of Benson as to his companion, the Plaintiff?

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Now, I say, from the evidence in the case, the jury might very well have found that this driver heard Benson hail the car, and that he saw the Plaintiff, in company with Benson, approaching, to get upon the car, and that he stopped his car for that purpose, and waited for Benson to get on, and he did not start his car until the Plaintiff had started to get upon the front seat.

If the driver did know that Benson and the Plaintiff had approached to get upon the car, and he stopped for this purpose, then he was negligent in not giving some attention to the matter. He should have looked to see that the Plaintiff was not in a dangerous attitude before he started his car. I concede that there was evidence given by the Defendant, from which the jury might have found these issues in favor of the Defendant.

The jury might have found that the car had started and was in motion when the Plaintiff started to get upon it.

The strength of the evidence, however, is that the car was standing when he started to get up.

I have said enough, in regard to the evidence in this case, to show that it was a case for the jury, and not the Court, to decide.

The rule is well settled in this Court, that it is a matter of right in the Plaintiff to have the issue of negligence submitted to the jury, when it depends upon conflicting evidence, or on inferences to be deduced from a variety of circumstances, in regard to which there is room for fair difference of opinion among intelligent men (Ernst v. Hudson River Railroad Company, 35 N. Y. R. 10). This case, in my judgment, falls within the rule.

The fact that the intelligent Judge who tried this case, regarded it as a case falling within this rule, is some evidence to us that it is of that class.

The fact that the General Term who reviewed this trial so regarded it, is some evidence upon this subject, especially as their opinions are based upon evidence, without any dispute as

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to the law. These opinions of the Judges in the Court below are not controlling with this Court, of course, but they are very proper to be considered in forming our opinions.

If this driver heard Benson hail the car, and seeing him and the Plaintiff approaching, stopped his car to receive them, and started his car again while the Plaintiff was getting on in front, there can be but little doubt that the Defendants are chargeable with negligence. It was the duty of the driver to look to it and see if they had got on before he started his car.

This was quite as much his duty as the making of change, with which he claims he was engrossed at the time.

He should have found time to do both.

If the Plaintiff attempted to get upon the front of this car while it was in motion, he was negligent and cannot recover. If, however, the car had stopped, and was standing when he started to get upon it, he was not negligent, for he had no right to suppose that the driver would start the car while he was in the act of getting on it in front.

The jury have found that the car was standing, else they could not have found for the Plaintiff, and there certainly is evidence in the case from which they may well have so found.

The jury have also found that the driver was negligent, and we have seen that there was evidence upon which this fact might be found.

There was an exception taken by the Defendants' counsel, upon the trial, to the rejection of evidence offered by the Defendants, but it is not insisted on here; and besides, it was properly rejected. Benson's statements, made out of Court, were no evidence against the Plaintiff, and they were not admissible to impeach Benson, for the reason that no foundation was laid for such evidence. Benson was in no manner inquired of as to such conversation.

The views above expressed lead to the conclusion that this judgment should be affirmed, which I advise to be done.

All affirm.

JOEL TIFFANY,
State Reporter.

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CHARLES W. SWIFT, APPELLANT, *v.* THE CITY OF POUGHKEEPSIE, RESPONDENT.

Certiorari—Boards of Assessors—Powers—Taxes—Error.

Where the assessors have jurisdiction of the person, and of the subject-matter, the assessment, though erroneous, is not void.

The determination of the assessors to impose a tax at a specified rate is a judicial determination; and, though erroneous, it lays no foundation for an action at law to redress the alleged injury.

In such case the remedy is by certiorari or writ of error.

THE Plaintiff appeals from a judgment of the Supreme Court in the Second District against him, upon a case submitted by counsel under the provisions of the Code in reference to submitting controversies without action.

The facts agreed upon are substantially these: The assessors of Poughkeepsie, in the year 1865, assessed the Plaintiff on the

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Taxes—Assessment—Recovery of money paid. 39 *N. Y.* 495; 40 *N. Y.* 381; 43 *N. Y.* 186; 53 *N. Y.* 56; 79 *N. Y.* 621; 87 *N. Y.* 455; 144 *N. Y.* 496 (64 *St. Rep.* 66); 27 *Hun,* 392; 36 *Hun,* 269; 71 *App. Div.* 231 (75 *N. Y. Supp.* 579); 61 *Barb.* 609; 40 *How. Pr.* 322; 41 *How. Pr.* 495; 45 *Super. Ct.* 511; 34 *Misc.* 20 (69 *N. Y. Supp.* 455).

Taxes—Assessment—Review—Collateral impeachment. 45 *N. Y.* 684; 48 *N. Y.* 99; 72 *N. Y.* 14; 92 *N. Y.* 611; 144 *N. Y.* 493 (69 *St. Rep.* 64); 9 *Hun,* 707; 38 *Hun,* 23; 12 *Hun,* 569; 91 *App. Div.* 303 (86 *N. Y. Supp.* 659); 61 *Barb.* 471; 8 *Misc.* 13 (58 *St. Rep.* 308; 28 *N. Y. Supp.* 81).

Taxation—Pension money—Exemption. 35 *App. Div.* 176 (54 *N. Y. Supp.* 857).

Taxes—Assessment—Review—Mode. 39 *Hun,* 528; 53 *Barb.* 233; 57 *Barb.* 380; 8 *Abb. N. S.* 279; 1 *Lans.* 478; 6 *Lans.* 124; 13 *Misc.* 701 (69 *St. Rep.* 176; 34 *N. Y. Supp.* 1095); 27 *Misc.* 39 (57 *N. Y. Supp.* 259).

Certiorari—Appeal—Review of facts. 40 *N. Y.* 107, 158; 51 *N. Y.* 446; 55 *N. Y.* 602.

Judgment—Jurisdiction—Collateral Attack. 58 *Barb.* 71.

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amount of certain shares of stock in the Farmers and Mechanics' National Bank, at their par value. The cashier of the bank notified the assessors that the bank held a certain amount of the bonds of the government, as a part of their capital, and claimed that the Plaintiff could not, therefore, be taxed therefor; but the Plaintiff did not appear before the assessors, nor take any measures to correct or reverse the assessment.

A warrant for the collection of this tax was duly issued to the collector of taxes for the city, and on the refusal of the Plaintiff to pay, the collection was enforced by levy on goods of the Plaintiff, and paid over to the treasurer of the city, and the money was applied by him to city purposes.

This action is brought to recover back from the city of Poughkeepsie the money thus collected and paid.

J. H. Reynolds for Plaintiff.
James Emott for Defendant.

BACON, J.—At a recent Term of this Court, this case was brought on, and was argued in connection with the two cases of Van Kleeck *v.* Woodruff, and Foster *v.* Van Wyck and others.

The first was an action against the collector of the city of Poughkeepsie, and the second against the assessors of the city, both being founded upon precisely the same state of facts that exist in this case. In the suits against the assessors, and collector, the claim was made that the assessment was wholly unauthorized by law; that the assessors had no jurisdiction to make it; and the tax being clearly illegal, its collection was a trespass upon the rights of the several Plaintiffs, for which they had an appropriate remedy; and that in this suit, the city having received the money, as well as authorized its collection, it was responsible to the Plaintiff for money had and received to his use; and that is the precise question presented by this case.

The opinion of this Court was pronounced at a prior Term, and the two cases against the assessors and collector were disposed of; but a sufficient number of Judges failed to concur in

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the opinion, so far as it related to the case of the present Plaintiff, and a reargument was consequently ordered, which was duly had at the last Term.

In the judgment pronounced in the two cases of Van Kleeck *v.* Woodruff, and Foster *v.* Van Wyck, &c., this Court held that the assessors had jurisdiction of the person of the Plaintiff and of the subject-matter, to wit, taxation, and of the property in question; and that although the assessment was clearly erroneous, it was not void; that the determination of the assessors to impose the tax, at the rate specified by them, was a judicial determination, and that although such error might be corrected by an appropriate proceeding, it did not lay the foundation for any action at law to redress the alleged injury.

The counsel on the part of the Defendant has sought to open and argue the question, whether the tax imposed in this case was one authorized by law, and the counsel for Plaintiff to present once more the argument that the assessors did not act judicially in making the assessment, and that having no jurisdiction of the subject-matter, their assessment was absolutely void. Neither of these propositions can now be entertained by this Court.

The question of the non-liability of the Plaintiff to taxation, in respect to the stock held by him in the bank, has been settled by the Supreme Court of the United States, in a case involving that precise point; and in the decision made by this Court, at the last Term, this is expressly assumed and conceded. The other question also, to wit, that the assessors, in making their determination, acted judicially, and are entitled to the protection which is accorded to all tribunals and parties thus acting, can no longer be regarded as an open question in this Court. This point, so far as the assessors are concerned, seems to have been put at rest in Barhyte *v.* Shepherd (35 N. Y. 238).

Before the judgment was pronounced in the two cases against the assessors, and the collector, the argument of the Plaintiff was perhaps permissible, for, undoubtedly, cases could be found looking in the directions both of imposing liability upon such parties, and extending to them the immunity which

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judicial tribunals have always enjoyed. But since the delivery of the opinion of Parker, J., to the extent that it was adopted by this Court, where the cases are considered, and the conclusion announced, that assessors and collectors are both protected by the same rule, to wit, that "where a magistrate or officer has jurisdiction of the subject-matter, and errs only in the exercise of it, his acts are not void, but voidable, and the only remedy is by certiorari, or writ of error," the whole question is precluded, and in this Court will not be reopened.

The Plaintiff claims to recover in this case under the broad and benigant doctrine that the action for money had and received will lie wherever the money sought to be recovered belongs, "ex æquo et bono," to the party seeking the remedy.

The wide scope and benign tendency of this principle is not denied, nor that, as a general rule, it will be applied to almost every case where a person has received money, which, in equity and good conscience, he ought to refund to the true owner. And yet it must be conceded that there are exceptions to the universal application of the rule. If it were not so, that other wholesome doctrine, "interest Reipublicæ ut sit finis litium," would be practically subverted, since the judgment of a Court of competent jurisdiction, followed by its enforcement, and the collection of the money, could be as readily attacked and as easily upset as a proceeding without judicial sanction, by which money has been unlawfully and wickedly extorted from another.

recover back money collected by virtue of legal proceedings,

But nothing is better settled than that no action will lie to unless such proceedings can be impeached as founded in fraud, imposition, or extortion. A party cannot proceed a step in such an action, if, in order to sustain it, the Court is called upon to review the merits, or the regularity of the proceeding, or determination, as the result of which the money was collected and paid over.

The logical result of this principle, it seems to me, determines this action in favor of the Defendant.

The moment this Court held and decided that, in determin-

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ing the question of the liability of the Plaintiff to taxation, in respect to the stock held by him, the assesors were exercising a judicial function, and that the assessment was in fact a judgment, the conclusion followed that their determination could not in this form be overhauled. Conceding the judgment they passed was erroneous, still, while it stood unreversed, it protected, not only them, but all who acted in supplementing and carrying out that judgment, and availing themselves of its fruits; and the money thus obtained can no more be recovered back by action, than can a suit be sustained and money recovered which has been collected upon the erroneous judgment of any Court of competent jurisdiction.

And I concur fully in the conclusion announced by this Court, when this and the other cases were before it, that "it would be an anomaly to hold that no liability attached to those who instituted and carried out the proceedings to compel the payment of the money by the Plaintiffs (there being no statutory protection), and yet that the individual or corporation who received it is legally liable to refund it."

No suit to recover taxes erroneously assessed, and paid over to a county, or a municipal corporation, has yet been sustained in this State, whatever may be the rule elsewhere. It is true that it has occasionally been intimated by Judges, in giving their opinions, denying certain other remedies, that actions of this character might be sustained, and this has been affirmed by counsel, arguendo, as may be seen in the cases of People *v.* Reddy (43 Barb. 539), and People *v.* Supervisors of Chenango County (11 N. Y. 567); but these cases have no authority; while on the other hand, although the point is not fairly decided, a strong intimation is given that no such action can be sustained, in the opinion in the case of Lorillard *v.* Town of Monroe (11 N. Y. 393).

The case of Chegary *v.* Jenkins (1 Seld. 376) held, that an action would not lie against a collector for enforcing the collection of a tax, where his warrant was regular, although it

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was questionable whether the property assessed was not exempt from taxation; and in the case of Chegary v. Mayor of New York (3 Kern. 229), where the action was brought to recover the money which had been passed by the collector into the city treasury, while the Court held that the property was not exempt, and therefore that the tax was properly assessed, the Court say that if the case had turned upon the question of liability of the Defendant, if the property had not been liable to taxation, the Plaintiff's right of recovery would have been very doubtful.

No precedent, therefore, can be found with us to sustain this action. The intimations against it are quite as strong as those in its favor, and in the light of the principle now applied to protect officers, judicial and "quasi" judicial, in their organization and action, it seems to me impossible to maintain the liability sought to be enforced against the Defendant.

It is not incumbent upon us to point out to the Plaintiff what remedy he has for what must be admitted to be a wrong and injustice which he has suffered.

Notwithstanding the principle which has acquired almost the character of an axiom, that there is no wrong without a remedy, there do arise in the course of human affairs certain hardships, which even the law, with its broad shield, cannot avert, or its sharp sword redress, and they must be submitted to, as personal and social wounds, immedicable and remediless.

But in this case we are not prepared to say that the Plaintiff has not, or rather had not, if he had availed himself of it in season, an ample remedy, by certiorari, to correct the assessment, while it was in fieri, and capable of being reached.

The Plaintiff denies the efficacy of this remedy, upon the ground, that, upon a certiorari, the Court will only consider the question of jurisdiction, and that, in this case, if the Court found, as it would, upon the doctrine now proclaimed, that the assessors had jurisdiction, their determination as to the legality of the tax could not have been reviewed.

It is true that this has been the doctrine of the Courts to a

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considerable extent, upon what ground, either of principle or necessity, I could never very clearly comprehend. But I think at this time a more libertl rule would, and should be applied, and that a certiorari would not only bring up the naked question of jurisdiction, but the evidence on which the body acted to which the writ is directed, as well as the ground or principle of their action, and thus present the entire case for review, and, if necessary, for correction. (See People *v.* Van Alstyne, 32 Barb. 131.) In the case of the Susquehannah Bank *v.* Supervisors of Broome County (25 N. Y. 312), Judge Denio says: "It is not necessary that we should show that the party complaining * * * could have his grievances examined in some other form; but we suppose that a certiorari might, in the discretion of the Supreme Court, be awarded to *determine the validity of a tax.*"

It is obvious that the validity of the tax could only be determined by bringing up the whole action of the assessors, and thus enable the Court granting the writ to pass upon the propriety of the assessment.

See further, on this point, Baldwin *v.* The City of Buffalo (35 N. Y. 380), Morgan, J., holding, substantially, that the writ will bring up all that is necessary to present the question of law on which the Relator relies.

If this remedy shall fail, and the city of Poughkeepsie should not possess sufficient honesty to refund voluntarily the money, which in good conscience it has no right to retain, the ultimate remedy must be by an application to the Legislature to provide some legal machinery to reach the case, or compel repayment by an act framed for that purpose, as has already, in several instances, been done.

The judgment must be affirmed.

Affirmed by GROVER, HUNT, MILLER, CLERKE, and BACON, JJ.

JOEL TIFFANY,
State Reporter.

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JOSEPH B. SMITH, APPELLANT, v. THE MAYOR, &c., OF THE CITY OF NEW YORK, RESPONDENTS.

Assignment—Public Office—Fees—Contract.

An office in this country is not property, nor are its prospective fees the property of the incumbent, which can be sold or assigned.

The office of Street Commissioner in New York is a public office, and is not the property of the incumbent, and the right to fees or compensation does not grow out of any contract between the government and the incumbent, but for services rendered.

A person holding an appointment of Deputy Collector of Assessments, in the city of New York, holds no contract with the government, and is legally entitled to fees to the extent of actual service as such Deputy Collector.

THIS is an appeal from an order made by the General Term of the Court of Common Pleas for the city and county of New York, reversing a judgment, entered upon the report of a referee, in favor of the Appellant, and against the Respondents, for $1,505.60, and ordering a new trial, with costs to abide the event.

One John J. Roof was appointed a Deputy Collector of As-

Officer—Salary—Performance of service. 80 *N. Y.* 190; 91 *N. Y.* 271; 1 *Hun,* 27 (3 *T. & C.* 132); 8 *Hun,* 441; 9 *Hun,* 286; 27 *Hun,* 262; 1 *T. & C.* 200; 59 *How. Pr.* 109; 64 *How. Pr.* 501; 44 *Super. Ct.* 327; 48 *Super. Ct.* 279; 31 *Misc.* 694 (65 *N. Y. Supp.* 329); 54 *N. Y. Supp.* 66; 9 *Daly,* 165.

Constitutional law—Salary—Vested rights. 68 *N. Y.* 283; 24 *Hun,* 263; 33 *App. Div.* 366 (53 *N. Y. Supp.* 876); 73 *App. Div.* 94 (76 *N. Y.* 331); 74 *Hun,* 520 (57 *St. Rep.* 213; 26 *N. Y. Supp.* 587); 3 *How. N. S.* 15; 8 *Daly,* 353.

Officer—Salary—Removal. 10 *Abb. N. C.* 419; 46 *App. Div.* 520 (62 *N. Y. Supp.* 147).

Office—Definition. 11 *Misc.* 99 (65 *St. Rep.* 165; 32 *N. Y. Supp.* 109).

Public office—Salary—Contract. 81 *N. Y.* 428; 55 *Hun,* 318 (28 *St. Rep.* 559; 8 *N. Y. Supp.* 439); 10 *Daly,* 280.

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sessments, on the 1st day of July, 1857, by Charles Devlin, then Street Commissioner of the city of New York, and duly qualified as such. He was removed from office on the 29th day of April, 1858, by Edward Cooper, then Street Commissioner. From the 1st day of July, 1857, until the 29th day of April, 1858, the said Roof was always ready and willing, and daily offered to enter upon and discharge all the duties of his said office, but the Respondents neglected and refused to allow him so to do, or to furnish him any employment in said office; and he did not in fact discharge any of the duties.

During the same period of time the said Roof was directed by the Street Commissioner of the Respondents to hold himself daily in readiness to enter upon the duties appertaining to his office, and to attend at the Street Commissioner's office every day; and with these directions he complied.

There are by law one Collector and four Deputy Collectors of Assessments, and their compensation depends upon the amount of assessments collected during their respective terms of office. Every assessment list includes two and one-half per cent. on the amount of the assessment, as a compensation to the Collector and Deputy Collectors of Assessments; and it is provided by an ordinance that the warrants shall be delivered in such manner as that each Deputy shall receive an equal number of lists for collection; and it is the practice that the compensation of each Deputy Collector is one-fifth of two and a half per cent. of the whole amount of assessments collected during his continuance in office.

The entire amount of assessments collected during the continuance of Roof in office was $237,678.23. One-fifth of two and a half per cent. of this sum is $1,188.39. During the continuance of said Roof in his said office, other employment, worth $3,000 per year, was offered to him.

The claim of Roof was assigned to the Appellant on the 20th day of October, 1858.

The office of Street Commissioner of the city of New York is a public office, created by law, and having extensive powers,

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among which is that of appointing Collectors of Assessments. There were contending claimants for the office of Street Commissioner—Devlin and Conover, the Plaintiff holding under Devlin.

An injunction was issued by the Supreme Court, restraining Devlin and his subordinates from acting until the decision of the case by the Court. The judgment was in favor of Devlin, under whom the Plaintiff claimed. The collections were made by Ira P. Libby, one of the Collectors who were retained.

A. R. Lawrence, Jr., for Appellant.
John K. Porter for Respondents.

HUNT, CH.J.—The substance of the Plaintiff's allegations is this: that Roof was appointed to the office of Deputy Collector of Assessments in the city of New York, in July, 1857, and continued to hold such office for about nine months; that he was ready and willing to perform its duties, but the Defendants would not permit him; that another person performed them and received the fees; that if he had performed these duties he would have received fees to an amount set forth; and upon these facts he alleges that the Defendants are indebted to him in the amount he would so have earned, and asks a judgment therefor.

An office in this country is not property, nor are the prospective fees of an office the property of the incumbent (Conner *v.* Mayor, 1 Seld. 285).

The incumbent cannot sell his office, or purchase it, or encumber it. It will not pass by an assignment of all his property, nor will such assignment affect his right to prospective fees (id., and cases cited, p. 290).

The Legislature may diminish or abolish fees at pleasure, or may render it a salaried office. The city of New York may do the same, when it fixes the rate of compensation. It is only in the cases of a few of the State officers that the constitution prohibits such interference. The same authority holds, and

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it is conceded by the Appellant here that the right to fees or compensation does not grow out of any contract between the government and the officer, but arises from the rendition of the services (id.; Dart. Col. *v.* Wodward, 4 Wheat. R. 627; The People *v.* Warner, 7 Hill, 81; S. C. 2 Denio, 272).

An office is an appointment or authority on behalf of the government to perform certain duties, usually at and for a certain compensation. Both the office itself, and the compensation, upon general principles of law, are entirely within the control of the government, to diminish, increase, or abolish. So it may at any moment be given up by the incumbent. There can be neither property nor contract in such a subject.

It is but a deputation for the benefit and advantage of the government. As the Plaintiff had no contract with the city of New York, upon the principle stated there could be no indebtedness for a breach of its terms, and the Plaintiff's action must fail. The Appellant cites several cases to show that an officer of a municipal corporation may maintain an action as on a contract against the corporation for the fees or salary attaching to his office. They are all cases, however, where the officer, being in possession, had actually performed the duties of his office, and do not involve the principles of the case before us. Thus, in Devoy *v.* The Mayor (39 Barb. 169), and in Canniff *v.* The Mayor (4 E. D. Smith, 431), there had been a change in the manner of appointing clerks in the Police Courts, the appointments having been transferred to the Board of Police. The officer discharged all the duties; the compensation was fixed by law, and it was held that a change in the manner of appointment did not affect the liability of the city to pay the salary. So in Lynch *v.* Mayor (25 Wend. 680), Judge Lynch had performed the duties of a Judge of the Court of Sessions, at a salary fixed by statute. The Defendants refused to pay, and upon an application for a mandamus, the Court denied it, holding that he had a perfect remedy by action. So in Baker *v.* City of Utica (19 N. Y. 326), the duties had all been performed, but compensation therefor

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was by law to be collected by assessment, and the Court held that the action could not be sustained until the assessment was collected.

If a corporation employ or appoint an officer to perform certain duties, at a compensation agreed upon, the services being performed, the corporation is liable to an action for the compensation. The action before us goes upon the ground of a contract to give the office to the Plaintiff, or to permit him to perform its duties, and that not having given it to him, or not having allowed him to perform its duties, and receive its fees, the Defendants are liable for this breach of contract.

There is no anology or similarity in the cases.

It is suggested that an amendment of the complaint should be permitted at this time, by which the same may be converted into an action for money had and received by the Defendants to the use of Roof. I have never known the exercise of such a power by this Court, and am not aware of any authority for it. In no event could it be granted, except by a motion of which the Defendants had notice, and in which the necessary terms could be enforced. I have not discussed the rule of damages adopted by the referee, nor whether the Plaintiff is entitled to fees for services performed by Libby, nor what defence arises from the injunction, nor what remedy the Plaintiff had or might have had against the parties obtaining the same.

The discussion of these points is unnecessary, if I am corcorect in the position that the Plaintiff has no right of recovery in this action.

All concur.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE OF THE STATE, &c., *v.* JAMES M. RAYMOND.

Quo Warranto—Constitution—City of New York—Tax Commissioners.

This was an action in the nature of a quo warranto, to determine the validity of the law relating to the appointment of Tax Commissioners within and for the city and county of New York.

The Court held that the office of Commissioner of Taxes, in and for the city and county of New York is a city or county office, and that the functions of such office existed, and were substantially exercised by ward assessors at the time of the adoption of the constitution of 1846, and therefore that the act of the Legislature, creating the Board of Tax Commissioners, and vesting their appointment in the Governor, with the advice of the Senate, is, to that extent, unconstitutional.

THIS is an action in the nature of a quo warranto, brought against James M. Raymond, a Commissioner of Taxes and Assessments in the city of New York, an office to which he was appointed by the Governor of the State of New York, by and with the advice and consent of the Senate, under and in pursuance of the provision of an act of the Legislature of the State of New York, passed April 17, 1867 (ch. 410, Laws of

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Constitutional law—Statute—Severance. 150 *N. Y.* 521.

Home rule—Power of legislature. 170 *N. Y.* 190; *D.* 172 *N. Y.* 435; 174 *N. Y.* 435, 446; 29 *Hun,* 180; 42 *How. Pr.* 424; 51 *How. Pr.* 159, 169; 64 *How. Pr.* 484; 67 *App. Div.* 383 (73 *N. Y. Supp.* 694); 67 *App. Div.* 379 (73 *N. Y. Supp.* 691); 79 *App. Div.* 204 (80 *N. Y. Supp.* 100) 79 *App. Div.* 211 (80 *N. Y. Supp.* 105).

Constitutional law—Office—Nature. 58 *N. Y.* 529; 108 *N. Y.* 10 (12 *St. Rep.* 773; 28 *Week. Dig.* 121); 35 *App. Div.* 304 (55 *N. Y. Supp.* 12); 35 *App. Div.* 305 (55 *N. Y. Supp.* 13).

Legislative power—Public officers. 37 *N. Y.* 666; 53 *N. Y.* 649; 31 *Misc.* 163 (64 *N. Y. Supp.* 535; 35 *Misc.* 211 (71 *N. Y. Supp.* 815; 32 *Civ. Proc.* 144); 35 *Misc.* 312, 313 (71 *N. Y. Supp.* 48, 49; 32 *Civ. Proc.* 143).

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1867). The only question presented for the consideration of the Court is the constitutionality of the act referred to.

The Judge at Special Term, in New York, decided that the act referred to was valid, and affirmed the right of Defendant to the office.

This judgment was reversed at General Term, and a new trial ordered, and from this order the present appeal is taken.

M. B. Champlin, Attorney-General, and *Henry H. Anderson,* for the Respondents.

William F. Allen, Waldo Hutchings, and *John H. Reynolds,* for the Appellant.

HUNT, CH.J.—I am for affirmance. The law of 1867 simply changes the mode of appointment of "Commissioners of Taxes and Assessments of the city and county of New York," authorizing the Governor and Senate to make the appointment. The act of 1859 (p. 678) authorizes the Comptroller of the city of New York to make the appointment of these Commissioners. By the act of 1857 (p. 497, vol. 2) the Supervisors of the county of New York were directed to elect these Commissioners by ballot. Their general and important duty, under each act, was to regulate the assessable property, as is done by assessors in the country. There is a difference in the detail of the duties, but their general character is the same under each act. In 1850 (p. 188) it was enacted that there should be elected, by the electors of the ward, two assessors for each ward, and the Supervisors were directed to appoint three Tax Commissioners, whose duties were prescribed in §§ 15 to 22, being generally to revise, review, and correct the assessment rolls, and deliver the same to the Supervisors. Previously to this time the duties of the assessors were substantially as prescribed in the Revised Statutes, the act of 1830 providing for a metting of all the ward assessors, for the purpose of equalizing the taxes. In effect, the Legislature have divided the duties of assessors as they existed in 1846, and have given an important part of them to Commissioners of

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Taxes and Assessments. The assessors are elected by the city and county authorities, or divisions of them, and under art. 10, §2, these Commissioners must be elected in the same manner (People *v.* Draper, 15 N. Y. 552; Pinckney, 32 N. Y. 381; Warner, 2 Denio, 272). The present law is in violation of this principle.

GROVER, J.—This is an action in the nature of a quo warranto, brought by the Attorney-General, to determine the title of the Appellant to the office of Commissioner of Taxes and Assessments in the city and county of New York. The Appellant was duly appointed to such office by the Governor, with the consent of the Senate, pursuant to section 1, chap. 410, Laws of 1867 (p. 981), and has duly qualified according to the requirements of said act. His right to the office, therefore, depends upon the constitutionality of said act. It is claimed by the counsel of the Respondent that the act in question is in conflict with section two, article ten, of the constitution, and, therefore, void. That section provides that all county officers whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties, or appointed by the Board of Supervisors, or other county authorities, as the Legislature shall direct. All city, town, and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns, or villages, or of some division thereof, or appointed by such authorities thereof as the Legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed as the Legislature may direct. There is no question but that the office in question is exclusively a city office. To determine whether the act in question is constitutional, so far as the power of appointment is thereby vested in the Governor, with the consent of the Senate, it is necessary to determine whether the office in substance existed at the time of the adoption of the

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present constitution, and if found not so existing, then the further question whether city, town, and county offices, subsequently created, may be filled in any mode prescribed by the Legislature. To determine the first question, it is necessary to ascertain the functions and duties of the office in question. These, upon examining the act in question, the act of 1859, page 678, the acts of 1857 and 1850, and the previous legislation, will be found to consist of power to appoint deputies, clerks, &c., who, together with the officers in question, by performing the various duties of their respective offices, are to make an assessment of all the property liable to taxation in the city, for municipal and State purposes; to correct the rolls of such assessments, and to equalize the same, and to preserve such rolls in an office to be kept by them, and deliver the same to those whose duty it is to levy the taxes upon such rolls, authorized upon the property of the city. It is necessary, also, to inquire whether the like functions were performed by any officers at the time of the adoption of the existing constitution. This all know must have been so, as taxation upon property is not wholly of modern origin, but has existed at intervals for State purposes, and at all times for municipal purposes, since the existence of the State; and there must necessarily have been at all times some mode by which a valuation of the property liable to taxation was made by public authority, as a basis upon which taxes were apportioned among its owners. An examination of the statutes in force at the adoption of the constitution, will show that such valuation was then made by assessors chosen by the electors of the respective wards of the city, two in each ward; that these ward assessors were required to assess all the taxable property in their respective wards, and when this was completed, they were all required to meet together as a board, and when so met, to compare, equalize, and correct all the assessment rolls of the city, and when completed the assessors were to deliver the same to those whose duty it was to apportion the taxes required to be collected upon the basis of such valuation.

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Thus it appears that precisely the same essential functions were performed in making, equalizing, correcting, and delivering the assessment rolls by the ward assessors, at the time of the adoption of the constitution, that were contemplated to be performed by the Commissioners of Taxes and Assessments by the act in question. That, although the names of the officers and their mode of appointment have been changed, the result to be accomplished by the one is identical with that of the other. But it is argued on the part of the Appellant, that additional powers have been conferred and additional duties imposed upon the Commissioners. This is true, they are to keep an office during the entire year, in which the rolls are to be kept for inspection; they are to procure and preserve maps of the lots in the city; to keep a record of the building permits; to them power is given to insert in the rolls property which has been omitted, and to do some other acts, none of which were required of the assessors, and which they were not authorized to do. But an examination of these new duties and powers will show that they are all such as are calculated to facilitate, and the better enable them to perform, the same essential duty performed by the assessors—that is, of perfecting a valuation of the property as a basis of taxation. Such additional facilities in the performance of the same duties, surely cannot make them new officers in the sense of the constitution.

If they can thus be made new, the section of the constitution above quoted may readily be made a mere nullity. I am far from conceding that it would be competent for the Legislature to take from the city all control over the assessment of the property of the city for purposes of taxation, and vest this power in the central authority, by conferring powers upon the officers or boards, upon which they conferred it over other subjects, and imposing duties upon them entirely foreign to those making the assessment. The plain intention of the section of the constitution in question, was to preserve to localities the control of the official functions of which they were then pos-

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sessed, and this control was carefully preserved, consistent with the power of the Legislature to make needful changes, by restricting the power of appointment of other officers to perform the same functions to the people, or some authority of the locality. Any other construction would render the section in question, when applied to the cities of the State, substantially nugatory. It is not enough that the name of the officer is changed, or the powers enlarged, to authorize the Legislature to confer upon the Governor the appointment of officers to discharge the duties performed by city officers at the adoption of the constitution.

This accords with the reasoning of the prevailing opinion in The People *v.* Draper (15 N. Y. 532), and also with that of other cases, although the precise point has never been decided by this Court. It is insisted that the assessors elected by the wards of the city were not city officers. It will be seen, by the act of 1830, that they not only assessed the property of their respective wards, but all were required to meet as a board, and act upon and perfect all the rolls of the city. This clearly made them city officers, within the meaning of the constitution. The acts of 1859, 1857, and 1850, gave the power of appointment of the Commissioners to some local authority of the city, and thus preserved the local control over the subject. The act of 1867 vests the appointment in the Governor and Senate, and thus deprives the city of all local control of the assessment of the property of the people for the purposes of taxation. It thus deprives the people of the city of a right secured to them by the constitution, and is, therefore, void. This renders a discussion of the question—whether the Legislature can provide for the appointment to a city office, created after the adoption of the constitution, in any mode deemed best for the public interest—unnecessary, for the reason that the office in question was not so created within the meaning of the constitution. I will simply remark, that this question was decided in The People *v.* Pinckney et al. (32 N. Y. 377), in which it was held that this power was possessed by the

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Legislature. The question was not at all discussed, but it was assumed that it had been decided in the same way in The People v. Draper (supra). A slight examination will show that there was no such question decided in the latter case. It was there held that the officers in question were not city officers in any constitutional sense, but officers of the district created by the act: consequently, this question was not at all in the case; and all that was said in relation to it was entirely obiter. Whether the question, under the circumstances, would be considered open in this Court, cannot now be de-

The judgment appealed from must be affirmed.

termined.

Affirmed.

JOEL TIFFANY,
State Reporter.

RUSSEL F. HICKS, RESPONDENT, v. AMARIAH H. BRADNER, APPELLANT.

Evidence—Testimony of Wife against the Husband.

In an action by the husband for criminal conversation with his wife, it is error to permit the wife to be used as a witness for or against the husband, on the trial of the issue joined between the parties.

THIS action was brought to recover damages of the Defendant for criminal conversation with the Plaintiff's wife, and tried at the Steuben Circuit in October, 1860, when a verdict was rendered in favor of the Defendant. Exceptions were taken upon the trial to the rulings of the Judge admitting evidence objected to, and judgment having been entered upon the verdict, the Plaintiff appealed to the General Term of the Supreme Court. A new trial was ordered, and the Defendant appealed to the Court of Appeals. No counsel appeared for the Appellant upon the argument, and no points were submitted by him.

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Spencer for Respondent.

MILLER, J.—It is evident that the Judge erred upon the trial in allowing the wife of the Plaintiff to be sworn as a witnsse, and to testify against her husband. At common law the husband and wife could not be witnesses for or against each other, and this rule of the common law is not changed by the provisions of the Code, which abrogate the disqualification of witnesses by reason of their being parties. These provisions, as they existed when this action was tried, have no application to a case like the one at bar, as has been held in numerous adjudications of the Courts (Hasbrouck *v.* Vandervoort, 5 Seld. 153; Smith *v.* Smith, 15 How. 165; Marsh *v.* Potter, 30 Barb. 506; Macondray *v.* Wardle, 26 Barb. 612; White *v.* Stafford, 38 id. 419; Carpenter *v.* White, 46 id. 291; Rivenburgh *v.* Rivenburgh, 47 id. 419).

As this error of the Judge was sufficient to authorize the General Term to grant a new trial, it is not necessary to examine the other questions raised, and the judgment of the General Term must be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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JOHN WAFFLE, RESPONDENT, *v.* JOHN DILLENBECK, APPELLANT.

Practice—Charge of Judge—Assault and Battery—Amount necessary to carry Costs.

In an action for an assault and battery, it is not error for the Judge to instruct the jury as to what amount of verdict necessary to carry costs against Defendant.

Bates for Plaintiff.
Moak for Defendant.

BACON, J.—This case presents but a single question, arising upon the charge of the Judge at the Circuit, before whom the cause was tried. The action was for an assault and battery; and after the parties to the suit had fully testified to the circumstances of the affray and the amount of punishment inflicted upon the person of the Plaintiff, with one or two corroborating witnesses on each side, the Judge charged the jury that, if their verdict should be for the Plaintiff, the amount was purely a question for their determination. He then added that a verdict for less than $50 damages would not entitle the Plaintiff to recover full costs, nor any more costs than damages, and that a verdict for the Plaintiff for $50, or more, would entitle the Plaintiff to recover all the legal disbursements and costs of prosecuting the action. To these propositions the counsel for Defendant excepted, and then requested the Court to charge the jury that, in arriving at their verdict, if they found for the Plaintiff, they had nothing to do with the question of costs, or

Trial—Instructions—Reference to costs. 37 *Hun,* 566; 17 *St. Rep.* 350 (1 *N. Y. Supp.* 828; 15 *Civ. Proc.* 131).

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whether or not their verdict would entitle him to full costs. The Court declined thus to charge, and the Defendant's counsel excepted.

The jury found a verdict for $50, on which judgment, with costs, was entered up, and, on appeal to the Supreme Court, the judgment was affirmed, sustaining the ruling of the Court; and the Defendant now comes by appeal to this Court.

The request of the Defendant's counsel to the Court, to charge in the language proposed by him, amounted to nothing more than the Judge had already charged.

The proposition, as put by the learned Judge, was "that it was right to tell the jury, in an action of assault and battery, in reference to what conclusion they should arrive at on the question of damages, what was the statute of the State in respect to the amount to be recovered to carry costs." This, it is alleged by Defendant's counsel, is error, and the point has been argued with considerable force and a good deal of ingenuity.

As an original proposition, and if the rule were now for the first time to be announced as a question of practice, or indeed of propriety, at the Circuit, I should be very much inclined to hold with him; and even now I am by no means sure that it is not a custom which, although it has obtained very considerable, perhaps almost universal sanction at nisi prius, is "more honored in the breach than in the observance." In this conclusion some of my brethren do not concur. and it remains only as an expression of my individual convictions on this point. Be this, however, as it may, it can hardly be said to be a practice that so clearly violates any principle applicable to this class of actions—where the damages, when they are awarded, are both punitive and compensatory, and therefore are permitted to take a wide range, and be in some measure indeterminate—that it constitutes an error in law which can be availed of as such to entitle the party to a new trial. The most that can be said, I think, is, that whether the Judge shall give such instruction or withhold it, is purely a matter of dis-

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cretion, depending somewhat, perhaps, upon the character of the case in which the information is given or declined, and not constituting an error in law upon which a valid exception can be taken.

Whatever may be the rule in England (and we have not found any case where the point is specially and sharply presented), yet the practice adopted by the Judge on the trial in this case has received so much judicial sanction in this State, that I think it must be conceded that the rule is so far settled with us, that it would be unwise now to disturb it. In Elliott *v.* Brown (2 Wend. 497) the decision rested upon another point, as controlling, but this question was presented in the case. The jury, it seems, propounded an inquiry to the Court, as to the amount of damages which it would be necessary to give in order to cary costs. The Judge, exercising his discretion in the matter, declined to give them any specific information on the subject, not deeming it necessary as an aid in determining their verdict.

In commenting on this Chief Justice Savage said: "It is the duty of the jury to ascertain what damages the Plaintiff has sustained, and also how much the Defendant ought to be punished; and if the jury consider the costs as part of the amount which the Defendant should pay, and wish to give no greater damages than barely enough to carry costs, or to give such a sum as will not carry costs, they have a right to do so. I think, therefore, it would have been proper to have given the the jury the information they wanted."

In short, that while on the one hand it was not error to withhold this information, if in the discretion of the Judge it does not seem expedient, it is no more erroneous, on the other, but may be a very proper exercise of discretion, to give the instruction sought.

In the case of Nolton *v.* Moses (3 Barb. S. C. Rep. 31) the question squarely arose at the Circuit. The action was slander, and the presiding Judge gave the precise instruction to the jury as was given in this case, as to the effect of a ver-

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dict for given amounts upon the question of costs. The Defendant's counsel excepted, and then requested the Court to charge the same proposition which the Judge in the case at bar was requested to give, which was declined, and an exception taken to the refusal.

The Court at the General Term disposed of it in a few words, indeed, but clearly and precisely, by saying that "It is common experience to apprise the jury as to the effect of their verdict upon the parties, in respect to the question of costs; and the practice has been expressly and repeatedly approved."

After these decisions, there being none whatever to the contrary, I think it would be unwise to disturb a practice which has grown into such wide use, and is so generally approved.

It is not, indeed, a case where we might hesitate to change a rule under which important interests or vested rights have intervened, and which would be seriously disturbed by its reversal, but as we do not see that the case is one where any question of principle is concerned, we think it better to abide by a rule applicable to that particular class of actions where considerable latitude and wide margin is given to juries, in respect to the measure of compensation they may award, as well as of punishment they are permitted to administer.

I think the judgment should be affirmed.

MASON, J.—The simple and only question in this case is, whether the Judge at Circuit committed an error in instructing the jury what damages would carry costs, and also in informing them that for any recovery for less than $50 the Plaintiff could recover no more costs than damages.

The action is assault and battery, and these instructions were correct. Now, nearly forty years ago, Chief Justice Savage, in delivering the opinion of the Supreme Court in the case of Elliott *v.* Brown (2 W. R. 497, 500) expressed the opinion that it was proper to give the jury such instructions in an ac-

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tion of this kind. And almost twenty years ago it was decided in the Supreme Court, in the case of Nolton *v.* Moses (3 Barb. R. 31), that in an action of slander it was proper to instruct the jury as to what sum in damages would entitle the Plaintiff to full costs, &c. The question was directly decided in that case, and Judge Willard, who at the time, I think, had had a longer experience in Circuit than any Judge upon the bench in the State, said: "It is common experience to apprise the jury as to the effect of their verdict upon the parties, in respect to the question of costs; and the practice has been expressly and repeatedly approved."

The practice in the Circuit, so far as my acquaintance has extended, has been to give this instruction to the jury in actions of this kind, and for more than twenty years this practice has obtained with me.

The Appellant's counsel has argued this question upon his brief with an elaboration and earnestness, as though a great principle was involved, and that it was vital to the administration of justice that the jury should be kept in ignorance as to the law of costs in this class of actions. I am not able to perceive any good reason why the jury should not be informed upon the subject, when all the costs under the Code are declared to be given by way of indemnity for the expenses of the party in the action (Code, § 303).

The rule having so long obtained with us, I do not think that the Appellant's counsel has given us any sufficient reason for changing it, especially as the practice at the Circuit in this respect has been expressly approved by the Supreme Court in banco for more than twenty years.

I advise the affirmance of the judgment.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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GEORGE R. SHIBLEY AND OTHERS, APPELLANTS, v. DAVID ANGLE AND OTHERS, RESPONDENTS.

Joint-debtors—Contribution—Corporation—Co-partnership.

The rule that joint-debtors, &c., are severally liable to contribute each for any excess beyond his proportion paid to relieve from a common liability, is not unqualified in settling the equities between the parties themselves.

In such case, as between debtors joint in form and jointy liable to third parties, it is competent to show that one became bound for the benefit of all the others, or for his own personal benefit.

Subscription to the stock of a proposed seminary to be incorporated, does not constitute the subscribers co-partners, or authorize any one to contract debts or advance money on the credit of such subscription, with a view to make the subscribers liable therefor.

WOODRUFF, J.—The question in this case is, whether the Parties Plaintiff and Defendant bore to each other the relation of co-partners in such sense that they are bound to contribute for the reimbursement of those who, in addition to their subscriptions, have advanced money for the advancement of the enterprise set on foot by them.

It is in order that such contribution may be decreed that an accounting between the parties is sought

The general rule, that joint-debtors, joint-tenants, and tenants in common, co-sureties and co-partners, are severally liable to contribute, each for any excess beyond his proper share paid by either, in relief of the others from a common burden, is not called in question.

But this rule is not unqualified and invariable. The equities of the parties, as between themselves, are always relevant, and may defeat any claim to contribution, notwithstanding the burden as between them and third parties was common, and might have been enforced against all.

Hence, as between debtors joint in form and jointly liable for the whole debt, it may be shown that one became bound for the benefit of the other.

As between co-sureties it may, in defence to an action for contribution, be shown that one became bound and protected by a collateral agreement that he should be indemnified by

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the other, or that he became bound for the accommodation and at the solicitation of such other.

And as between co-partners, it may be shown that the debt to which the Plaintiff seeks to compel contribution was contracted by the Plaintiff without being authorized by the articles of co-partnership, or if within the apparent scope of those articles, yet for his individual benefit.

In short, liability to contribution does not depend alone upon the question whether the parties were jointly liable to third persons for the debt, which some of them have paid, but upon the equities existing between themselves, arising from their agreements or their acts inter se.

And the same is no less true in regard to moneys directly paid by some in the purchases made of property intended to be used in the enterprise.

What, upon the facts found, were the relations established between the parties?

The referee finds that the Plaintiffs and the Defendants (excepting certain five who are mentioned) "became stockholders in the Carlisle Seminary—a seminary of learning, located in the village of Carlisle, Schoharie county, New York."

"That they did not become partners or members of a joint-stock association."

That the paper annexed to his report was signed by the Plaintiffs and some of the Defendants, as follows:

"We, the subscribers, wishing to establish a seminary of learning at the village of Carlisle, in the county of Schoharie, to be incorporated according to law, and to go into operation as soon as practicable, and in order to create a fund and capital stock for the purpose, do hereby mutually and severally promise and agree, to and with each other, that we will each take and pay for stock therein to the amount set against our resepective names; said stock shall be issued in shares of $25 each, and the whole amount shall not be less than $10,000. Subscriptions to be paid in such installments as may hereafter be determined on by the stockholders.

"Dated December 31, 1852."

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That the institution in which the said parties became stockholders was incorporated by the name of "The Carlisle Seminary," by the Regents of the University of the State of New York, on the 20th day of October, 1853, and a charter issued; and that scrip under the corporate seal was issued to the Plaintiffs and other stockholders of the seminary.

That the Plaintiffs in this action acted as trustees, and advanced and became liable upon notes for money, which has been expended in the erction and furnishing of said seminary, to the amount of several thousand dollars; and that such advances and liabilities were mostly made before the incorporation of the said seminary, but were made and incurred by the said Plaintiffs upon the credit of the corporation, and not upon the credit of the stockholders, or of the Defendants personally, and that the Plaintiffs, after the charter was issued, obtained judgments for their said demands against "The Carlisle Seminary," in the Supreme Court of this State, which judgments have not been satisfied.

The finding of the referee, that the parties did not become partners or members of a joint-stock association, is, of course, to be taken in connection with his finding of the actual agreement which was signed.

The true question arising upon the facts found is, did the signing of the agreement subject the signers to a liability to contribute to the advances made by the Plaintiffs, as trustees, as stated in the subsequent finding?

It certainly contained no express authority to any one to contract liabilities or advance money for the common benefit.

There are no terms of agrement by the parties to do anything except to take stock and pay therefor; and there is no finding that this agreement has not been performed.

From such a promise no implied authority can be inferred, warranting any of the parties in contracting debts, or advancing money on the credit of the other parties, or of the parties jointly or otherwise, except in faith that the subscribers would pay what they agreed to pay.

The agreement so signed is simply an agreement to take and

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pay for stock in an association to be incorporated. It did not contemplate the conduct of any enterprise as co-partners, nor as members of an unincorporated joint-stock association.

At most, it contemplated the taking of such preliminary steps as were essential to the procurement, either from the Legislature or from the Regents of the University, of the requisite act which should create an incorporation under the laws of this State. And it is not claimed here that the moneys subscribed and paid were not more than sufficient to pay any expense of such incorporation.

If, by the mere association to procure an act of incorporation, a relation in the nature of co-partnership was established, it was confined to the simple purpose of obtaining an act of incorporation to carry into accomplishment the wish of the parties to establish a seminary of learning. And it conferred no power upon any of the associates to do any thing not reasonably necessary for the purpose.

Whether any pecuniary advantages were expected to result from the establishment of such an incorporated institution, and their taking and paying for stock therein or not, does not affect the construction of this agreement in respect of the power or authority conferred.

But in my judgment the only obligation assumed by any subscriber to the others, or any of the others, was to pay the sum subscribed. The expression of their desire to establish a seminary of learning was not a communication of authority to take measures on their responsibility for that purpose, but a mere suggestion of the motive or consideration inducing them to agree to pay the specified sums of money mentioned by each as a subscription to its stock.

This view of the subject renders the further findings of the referee consistent with the relations established by the agreement, viz.: that certain of the parties, in reliance upon the corporation about to be created, and not on the credit of the subscribers to its stock, made advances to facilitate the early procurement of land, buildings, &c., for the use of the corporation.

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Whether, or to what extent, or in what form, the corporation subsequently created was liable for such advances, or whether there was an equitable lien upon the property purchased, or upon the money subscribed, it is not necessary to inquire here.

It is enough to say that the subscription to the stock imported no authority as partners, or otherwise, to involve the subscribers in any liability not expressed in the agreement, or resulting from the procurement of the incorporation which the agreement contemplated.

In this view, the cases cited and relied upon by the counsel for the Appellants are not in conflict with the result stated.

Skinner *v.* Dayton et al. (19 J. R. 513) holds that when one of two or more members of an association makes a contract purporting to bind the association, although without express authority, those who by their acts or assent had ratified the act are responsible and bound to him to contribute to damages resulting from the breach; and that a stipulation in the articles of association by which they agree to pay all assessments made upon their shares, or forfeit the same, with all previous payments thereon, did not relieve them from the obligation to contribute, and give to them an election to forfeit their shares.

Townsend *v.* Goewey (19 Wend. 424) holds that when an incorporated joint-stock association is formed, and the subscribers agree to take the number of shares specified in their several subscriptions, and to pay in the same to trustees named, as such trustees shall make calls therefor, an action at law will lie in the names of such trustees to recover the amount of calls duly made, notwithstanding such trustees are also shareholders, and notwithstanding before suit brought the association has been incorporated and the trust has passed to other persons.

Cross *v.* Jackson (5 Hill, 478) is to the like effect. The other cases turn upon the question whether the liabilities incurred were according to the true construction of the articles of association, authorized by the associates, or ratified by them,

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or whether the associates were liable to third persons for liabilities or debts incurred in furtherance of the object of the association, and not whether, as between themselves, they were bound to contribute to liabilities not authorized by such articles.

Considered, therefore, upon the facts found by the referee, there is no serious question in the case.

On the hearing in the Supreme Court, and in the argument of the Appellant's counsel, the question had a wider range.

The Supreme Court had power to review the whole case upon the evidence, and upon the questions of fact involved in the issue (Code, §§ 272, 268). Upon that review, and upon proofs showing that some of the subscribers have not paid their subscriptions in full, they have reserved to the Plaintiffs any rights they may have to compel such payments; and deeming the proof satisfactory that certain of the subscribers authorized the advances or liabilities to which contribution is sought, the Supreme Court authorized an amendment, upon terms, to enable the Plaintiffs to save the effect of the Statute of Limitations, and proceed for contribution from such Defendants.

We have not jurisdiction to review the findings of fact in cases coming before us on appeal from a judgment of affirmance in General Term, nor in case of reversal, unless it is stated in the judgment of reversal to have been reversed on questions of fact. So far as the Supreme Court modified the judgment of the Special Term, the modifications were in the Plaintiff's favor, and the Defendants have not appealed.

If, by reason of an exception taken to the decision of the referee, on the ground that he *did not find* some fact which the Appellants claim was established by the evidence, we were at liberty to examine the proofs bearing on the question whether the Defendants intended a partnership, or did such acts as made them liable as partners inter se, or whether all the Defendants authorized the advances in question, I should still be of opinion that the judgment of the Supreme Court gave

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to the Plaintiffs all that they were legally or equitably entitled to.

The statute relating to the founding of academies (1 Rev. Stat. 461) authorized the founders and benefactors of any academy, or as many of them as shall have contributed more than one-half of the property collected for the use thereof, to apply to the Regents of the University for an incorporation, by a name specified, and in the application to nominate the trustees; and it may be granted by an instrument under the common seal of the Regents. And thereupon the property and funds of the academy are vested in such trustees. The statute then proceeds to define the powers and duties of the trustees, &c.

It was shown that in January, 1853, a meeting of subscribers was held, and articles were adopted and signed by "most of those present."

The first article provided that the institution should be called the Carlisle Seminary, *and be incorporated as soon as possible;* that the business affairs of the institution should be under the management and control of a Board of Trustees; that there should be twenty-one trustees, &c.; and other regulating articles were adopted. They elected twenty-one trustees, and afterwards the application was made to the Regents of the University for incorporation under the name designated, and the persons so chosen were nominated trustees, with the exception of two, one of whom declined the office, and the reason for the omission of the other does not distinctly appear.

I cannot think that the referee or the Supreme Court erred in regarding the articles so agreed to as not establishing any such relations between the Defendants as would authorize the Plaintiffs to contract debts or make advances on the credit of the associates. They were looking to an incorporation as the immediate means of effecting the object of the association. They fixed the name and agreed upon the trustees. They were to be the trustees who should manage the affairs of the institution, which should be incorporated as soon as practicable.

It would be an unreasonable latitude of construction to say

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that in the interval which might elapse the persons so designated were authorized to involve the association in debt, on the responsibility of the associates. So far as we can discover, there was no impediment to an immediate incorporation, and this was evidently contemplated.

The other proceedings which were proved tend to show that certain of the subscribers, in their capacity of trustees, or otherwise, sanctioned the advances afterwards made, or authorized them; and, so far as they made themselves liable to contribution, the Supreme Court allowed the Plaintiffs the privilege of an amendment for the purpose of charging them.

It follows, I think, that whatever ground third persons may have had (if any) to charge the Defendants as jointly liable for the acts of the trustees, or any of them, there was an entire want of authority expressed or implied in the agreement, as between the associates, to make advances or incur liabilities on their credit, and that no right therefore exists to compel a contribution from the associates at large to reimburse the Plaintiffs.

The Appellants in their points suggest that they ought not to be concluded by their election not to amend according to the permission given them in the Supreme Court, and that this Court, if of opinion that the judgment should be affirmed, ought to give to the Appellants the privilege of making the amendment, and continuing the action, as if no appeal had been taken.

The Appellant, in that respect, has placed himself in a position, analogous to that of a Defendant who demurs to the complaint, and who, when judgment is ordered for the Plaintiff, with leave to the Defendant to withdraw his demurrer and answer within a time limited, declines to act on the leave given, elects to submit to final judgment for the Plaintiff, and appeals therefrom to this Court. In such case his right to answer is waived, and this Court has no power to revive it.

So, as I think, here we have only to say, the judgment must be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

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CLARA A. DAVENPORT, RESPONDENT, *v.* ELISHA RUCKMAN, AND THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK.

Corporation—Safety of Streets—Liability—Lessee of Lot on Street— Excavation.

The streets or sidewalks in a city are for the benefit of all classes and conditions of people; and they are at liberty to regulate their conduct in respect thereto, upon the assumption that they are in good condition.

The Corporation are liable for injuries inflicted upon persons passing along the streets or sidewalks of the city, in consequence of the dangerous condition of such streets or sidewalks, whether such injury arises from some act done by the Corporation, or from some omission of duty on their part.

Highways—Defects—Liability of abutting owner or lessee. 101 *N. Y.* 149; 156 *N. Y.* 359; 54 *Hun,* 49 (26 *St. Rep.* 42; 7 *N. Y. Supp.* 158); 64 *Hun,* 184 (46 *St. Rep.* 158; 18 *N. Y. Supp.* 915); 49 *Hun,* 231 (17 *St. Rep.* 36; 1 *N. Y. Supp.* 633; 28 *Week. Dig.* 568); 55 *App. Div.* 94 (66 *N. Y. Supp.* 1067); 95 *App. Div.* 238 (88 *N. Y. Supp.* 739); 1 *T. & C. Add.* 23; 33 *How. Pr.* 35.

Streets—Personal injuries—Liability of municipalities. 4 *Keyes,* 266; 50 *N. Y.* 238; 74 *N. Y.* 270; 96 *N. Y.* 271; 160 *N. Y.* 128; 177 *N. Y.* 289; 1 *Hun,* 343 (3 *T. & C.* 506); 3 *Hun,* 512; 10 *Hun,* 536; 111 *App. Div.* 330 (97 *N. Y. Supp.* 1108); 113 *App. Div.* 423 (99 *N. Y. Supp.* 288); 5 *T. & C.* 581; 57 *How. Pr.* 365.

Highways—Defects—Care required of travelers. 38 *N. Y.* 449; 45 *N. Y.* 131; 55 *App. Div.* 504 (66 *N. Y. Supp.* 1061); 7 *App. Div.* 522 (40 *N. Y. Supp.* 257); 11 *App. Div.* 269 (42 *N. Y. Supp.* 154); 51 *St. Rep.* 408 (22 *N. Y. Supp.* 381).

Highways—Obstructing—Injury—Liability, 4 *Hun,* 27; 6 *T. & C.* 137.

Highways—Defects—Contributory negligence. 75 *N. Y.* 175; 3 *Hun,* 711; 10 *Hun,* 480; 13 *Hun,* 85; 3 *T. & C.* 420; 6 *T. & C.* 95; 6 *Lans.* 78.

Highways—Defects—Joint liability. 7 *Hun,* 329; 12 *Hun,* 554; 5 Lans. 51.

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The lessee of premises upon which the sidewalk is out of repair, by reason of an opening therefrom into the cellar on said premises, may be liable although the premises are at the time in the occupation of a sub-tenant who had agreed to keep the walk or premises in repair.

THIS was an action brought to recover damages for injuries sustained by the Plaintiff in falling into an excavation made in the sidewalk of a public avenue in the city of New York, and not sufficiently guarded, in front of a building on such avenue, of which the Defendant Ruckman had a lease, and of which building he was the owner.

The excavation in question was a cellar-way, below the level of the pavement, extending on the sidewalk six feet in front of the line or side of the street, with descending steps to a cellar-way in the front wall of the building. It was not covered, or railed in, at the time of the accident, and had been in the same condition for some time previous. It had been once enclosed by wooden doors, and another time by an iron railing, which had long previously been removed.

The Defendant Ruckman did not make the excavation, but was the assignee of a lease, for twenty-five years, of the premises behind it, into which the steps in it led, and, by such lease, owner of the buildings to be erected during the term. They were occupied at the time of the accident by a tenant of his (Lamb), with whom he agreed to put the premises in repair. The Defendant Ruckman never repaired the premises, was frequently there to collect his rents, and paid his own.

The Plaintiff's organs of sight, at the time of the accident, were affected by disease, so as to diminish her powers of vision considerably; yet she could distinguish persons and colors, and objects having a "distinct outline."

A verdict having been rendered for the Plaintiff, with damages, various exceptions, taken on the trial, were ordered to be heard, first at General Term.

One exception was taken to a refusal to dismiss the complaint, and others to instructions to the jury, and refusal to charge as requested.

The counsel for the Defendants, the Corporation of the

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City of New York, requested the Court, among other things, to charge, in substance, in reference to their duty, as follows:

First: They were not bound to see that such an opening as that into which the Plaintiff fell was closed in the daytime.

Second: They were not bound to see that the streets were in such a condition as to be safe for a blind person to pass, without a guide.

Third: They were not liable, unless the opening into which the Plaintiff fell was of such a character as to have been dangerous to persons in possession of their sight, and exercising ordinary care.

And in reference to the conduct and negligence of the Plaintiff:

First: She was bound to use more than ordinary care in passing along the sidewalk.

Second: It was negligence for her to walk alone upon the sidewalk, without a guide, if she was unable to determine for herself whether it was free from obstructions or excavations.

The counsel for the Defendant Ruckman requested the Court to charge the jury, in substance, among other things, in reference to his liability for the injury to the Plaintiff:

First: That he was not in possession of the premises at the time, but his tenant, Lamb, was, who had been so for six days before the date of the lease to him, and was bound by his lease to keep the premises in repair.

Second: That Mitchell or Lovett owned them in fee.

Third: That the Defendant knew nothing of the removal of a railing adjoining the excavation in question, and was pre-
unless a person with ordinary vision, using ordinary care and prudence, passing along the sidewalk in broad daylight, would be unsafe or liable to be injured from the unsafe condition of the area; and

Lastly: That the Plaintiff was guilty of negligence in going into a public street in her condition.

The Court instructed the jury, as to the duty of the corpora-

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tion in reference to excavations of this kind, that it was "their duty to see that places of that description were kept in a safe condition;" there was, in the ordinance passed by them, "an implied permission to construct them in the manner prescribed;" and when made with such permission, they are "responsible for injuries necessarily resulting from them;" "it is their duty to see that such places are maintained in a proper and safe condition;" and, in reference to their being chargeable with notice of "the dangerous condition of any such opening," that, "if it had been a recent occurrence, . . . an express notice of some kind to them would be required, but where the dangerous condition of the street or sidewalk has continued for a long space of time, such express notice is not necessary;" they "may be resonably presumed to have become acquainted with the condition of the street in this particular."

They have ample means and every facility secured to them for fulfiling their duties, and seeing that all dangerous places in the public streets are properly guarded; they are bound to fulfill that duty, and, if they neglect it, are to be held responsible.

In reference to the Plaintiff's negligence in going into the street unattended, in the actual condition of her organs of sight, the Court charged the jury, "that the circumstances that she was partially blind, and fell into this opening in the daylight, was not of any importance," The question was, "whether it was so improper and imprudent for the Plaintiff to have gone into the street, unattended, in her then condition of sight, that it would be negligence on her part to do so." But if she "possessed sufficient sight to give her a reasonable assurance that she might travel the streets safely, while they were in a good and proper condition—in the condition in which the Defendants were bound to maintain them—she would not be guilty of negligence in going abroad unattended."

"The assumption in law must be that the streets are in good condition, and the question to be determined by the jury" was,

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"Had the Plaintiff sight enough to go with reasonable assurance of safety through the streets," if they were kept in good condition?

To these conditions the Defendants' counsel excepted.

The Court instructed the jury, also, that the Defendant Ruckman was to be considered the owner of the house, and it was "his duty to provide proper guards for the opening, and see that it was safely kept."

To these instructions the Defendant Ruckman's counsel excepted.

The General Term ordered judgment for the Plaintiff upon the exceptions, from which judgment the Defendant now appeals to this Court.

H. H. Anderson for Appellants.
William Tracy for Respondent.

HUNT, CH.J.—The jury have determined in favor of the Plaintiff both the question of the negligence of the Defendants and the absence of negligence on the part of the Plaintiff. There were sufficient facts in evidence to warrant the submission of these questions; and if the legal propositions were properly decided by the Court, the judgment must be affirmed.

It is insisted that, under the circumstances indicated, the corporation of the city of New York has been guilty of no negligence. In other words, it has no such absolute duty laid upon it, of repairing the streets, as to render it subject to an action for its neglect; that the duty is modified by the fact that it resides in them as a political power, and that the corporation is endowed with a large discretion as to the expediency of making such repairs. This suggestion is not new. It has been before argued in this Court, and distinctly decided in the negative. The cases of Hutson *v.* The Mayor (5 Seld. 163), of Conrad *v.* The Trustees of Ithaca (16 N. Y. R. 158), of Weet *v.* The Trustees of the Village of Brockport (id. 161), and of Congreve *v.* Smith (18 N. Y. 79), settle the liabilty, beyond

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further discussion, whether the injury arises from some act done by the corporation, or from an omission of duty on their part.

The Appellants further insist that the Plaintiff should have been nonsuited on the ground that she herself was guilty of negligence in walking through the streets unattended and nearly blind. In this connection may also be considered what, it is insisted, was error in the Judge's charge on this branch of the case. It appeared from the evidence that at and previously to the time of the occurrence of the accident, the Plaintiff was suffering from amaurosis, or paralysis of one of her eyes, and the power of vision of both eyes was impaired. She could not distinguish the features of those she met, but she knew that they were persons walking; and a short time before the injury she had been able, as it was testified, to distinguish the color of the coat worn by her physician; and she was in the daily habit of walking the streets as she had occasion. Contradictory evidence was given as to difficulties she met with in the street, on the same day of the accident, and before its occurrence. It was for the jury to ascertain the truth on that subject. The Judge informed the jury that the circumstance that this person was partially blind, and fell into this opening in the daylight, was of no importance, and that it was not important that such a distinction should be made in the present instance.

He adds, the question is this, "whether it was so improper or imprudent for Miss Davenport to have gone into the street unattended in her then condition of sight, that it would be negligence on her part to do so, sufficient to prevent her from recovering compensation for an injury she might sustain from the negligence of others, while traveling or passing along the streets?" This was the precise question to be determined by the jury, and, I think, should have been submitted as a question of fact, and that it was finally submitted in the above proposition. The streets and sidewalks are for the benefit of all conditions of people, and all have the right, in using them,

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to assume that they are in good condition, and to regulate their conduct upon that assumption. A person may walk or drive in the darkness of the night, relying upon the belief that the corporation has performed its duty, and that the street or the walk is in a safe condition. He walks by a faith fortified by law; and if his faith is unfounded, and he suffers an injury the party in fault must respond in damages. So, one whose sight is dimmed by age, or a near-sighted person, whose rays of vision are always imperfect, or one whose sight has been injured by disease, is each entitled to the same rights and may act upon the same assumption. Each is, however, bound to know that prudence and care are in turn required of him; and that if he fails in this respect, any injury he may suffer is without redress. The blind have means of protection and sources of knowledge of which we are not aware; but we are not called upon to give any opinion upon a case of total blindness. The Plaintiff could see persons, and could distinguish outlines. If a post had obstructed her path, the jury might well have said, upon this evidence, that she would have seen and avoided it. Whether a hole in the ground could be distinguished by her, and avoided, was for the jury to say; and whether her power of sight was sufficient to justify her in walking the streets alone, was eminently a question for them. "A reasonable assurance of safety" in passing through the streets when in a good condition, as submitted by the Judge, was a fair test of capacity. That which is assured is made certain, secure, or fixed; and no better standard could be presented than a reasonable certainty of safety in using the streets (Sheridan *v.* Brooklyn, &c., R. R., 36 N. Y. R. 39; Ferris *v.* Union Ferry Co., 36 N. Y. 312; Renwick *v.* N. Y. C. R. R., 36 N. Y. 132; Ernst *v.* Hudson R. R. R. Co., 35 N. Y. R. 9). I see no objection to the rulings of law in regard to the liability of the Defendant Ruckman.

He was the owner of the house, and had allowed the cellarway to become and to remain in a dangerous condition. He had recently sublet the premises to one Lamb, who entered into

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possession a few days before the trial. It was in a dangerous condition when he put his tenant in possession. This does not operate to release the Defendant from his liability. It simply added another party to the negligence. As between those parties, Ruckman was the principal, as it appears by the lease and by the testimony that he agreed to put the premises in repair, but had failed to do so (Congreve *v.* Smith, supra; Dygert *v.* Schenck, 23 Wend. 446).

Both the Defendants were liable to the plaintiff for her damages, and there is no objection to their being joined in one suit.

The judgment should be affirmed, with costs.

All affirm.

JOEL TIFFANY,
State Reporter.

CATHARINE S. GIBSON, RESPONDENT, *v.* THE AMERICAN MUTUAL LIFE INSURANCE COMPANY, APPELLANT.

Evidence—Religious Belief—Life Insurance—Condition of Policy—Attending Physician.

In an action to recover for an insurance upon the life of the deceased, it is incompetent to inquire into the religious faith of the deceased, with a view of influencing the question whether, in such case, death was occasioned by an intent of self-destruction, or of accident.

To assume that a belief in Christianity will prevent or tend to prevent the commission of suicide, or that Atheism will tend to produce such an effect, is to adopt a principle too subtle, speculative, and remote, to be recognized in law.

To ask the assistance of one who had been the family physician, but who had long since ceased to practice, while waiting the arrival of the regular physician, who had been sent for, does not constitute the employing such ex-physician under the provisions of the policy requiring the statement of the attending physician.

Witnesses—Physician—Privilege. 5 *Hun,* 6.

Evidence—Religious belief of witnesses: 176 *N. Y.* 159.

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Opinion by HUNT, CH.J.

THIS was an action on a policy of insurance on the life of Marcus W. Gibson, issued March 8, 1858, for seven years, payable to Catharine S. Gibson, his wife.

The defences set up in the answer, and insisted upon on the trial, were:

First. That the proof furnished "omitted to state truly the cause of the death of said Marcus."

Second. That "the said Marcus W. Gibson committed suicide, by designedly shooting and wounding himself, with the design and for the purpose of producing death, of which shooting and wounding said Marcus died."

The proofs furnished, and which were produced by the Defendant on the trial, and offered in evidence, were the certificate of the officiating clergyman at the funeral of Gibson, and the statement of John G. Meachem, the attending physician of Gibson during his last sickness, made in answer to printed interrogations furnished by the Defendant; and the affidavit of the Plaintiff.

The condition required that among other things, the proof should contain the name of the physician or physicians, and other friends in attendance, and the place and date of burial, . . the affidavit of the medical attendance, &c.

Gibson died on the 24th day of March, 1860. The Defendant proved, by Gibson's declarations, that "he was crossing a log with his gun in his hand; that his foot slipped and he fell off, and the gun went off and shot him through the bowels."

After receiving the wound which caused his death, Gibson was brought to his own home, and lived about twenty-four hours.

The Defendant put the following question to one of the witnesses: "Have you had an opportunity of knowing his religious sentiments?" and proposed to show that Gibson was an Infidel. This evidence was excluded by the Judge, and the Defendant excepted to his decision. To another witness the Defendant put the question: "Did you know his religious sentiments?" and offered to show that Gibson was an Atheist. This evidence

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was excluded, and the Defendant excepted to the decision. The jury rendered a verdict for the Plaintiff, and, upon an appeal to the General Term, the judgment was affirmed.

The Defendant now appeals to this Court.

C. G. Munger for Appellant.
D. U. Thayer for Respondent.

HUNT, CH.J.—In his elaborate argument the Defendant's counsel insists, as his first ground of appeal, that the preliminary proofs were deficient, in that they did not contain the affidavit or certificate of Dr. Bartlett, as one of his attending physicians. Although he had been a practising physician, Dr. Bartlett was not such at the time of the death of Gibson, and had not been for some years previously. He was one of the sympathizing friends, who, on occasions of accident or death, are present to give aid and comfort. Mrs. Gibson, immediately on the arrival of her husband, despatched a messenger for Dr. Meachem, the family physician. In the meantime, the wounded man being in great pain, some one suggested that Dr. Bartlett had better make an examination of his wounds. Mrs. Gibson assenting, he did so and also gave him morphine to relieve his pain. Upon the arrival of Dr. Meachem, he took charge of the case. It does not appear that Dr. Bartlett acted in any other than a friendly capacity, or that he had at any time desired, or expected, compensation for his services. I do not know that he could claim compensation in money for his kind offices, any more than could the other neighbors present and assisting. The Defendant did not make any request that this question should be submitted to the jury, but claimed, as a matter of law, that Dr. Bartlett was an attending physician.

This claim cannot be sustained. The question in contention at the Circuit was, whether the death of the deceased was accidental, or whether it was a case of intentional self-destruction. To aid in elucidating this inquiry, the Defendant insists that he had the right to show that the deceased was an Infidel and an Atheist, and thence to draw an argument in support of the

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theory of intentional suicide. The Defendant insists upon the competency of this evidence, upon the further ground that every man is presumed to be a Christian; that the Christian religion prohibits self-slaughter; that this presumption may operate upon the minds of the jury, and should be allowed to be overthrown by the testimony offered.

It is not necessary to say how far, or how precisely, the presumption of personal Christianity exists. That we live in a Christian country is certainly acknowledged by the laws of the land, which prohibit blasphemy and profanity, and enjoin the observance of Sunday. That we believe in a governing Providence, by whom crime will be punished, and virtue rewarded, is assumed in every oath that is administered. To say, however, that every man is presumed to be a personal Christian, upon whose mind, and upon whose actions, the precepts of the Gospel exercise an influence, is so much against our common experience, that it cannot be admitted as a legal principle. It may be argued, however, that a man may hold this belief, although his actions be not at all times influenced by it.

This is probably true; and here arises the difficulty in the admission of the evidence offered. It is speculative, uncertain, remote, and based upon no well-defined legal principles. Consider the great variety of creeds held by those calling themselves Christians. We find not only the Roman Catholic, the Episcopalian, the Presbyterian, the Methodist, and Baptist, but a large class who believe in the punishment of sin in this world, and the ultimate salvation of the whole human race. These are all Christians, in every acceptation of that term. They all acknowledge the inspiration of the Holy Scriptures, and the obligation of its commands.

In what way, and how far, do these systems of belief operate upon the conduct of man? Is it certain that he who believes in the eternal punishment of the impenitent in a future world, is a better observer of the laws of his country, and more free from actual crime, that he who denies that doctrine? Or is it certain that he who believes in the final salvation of all men

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would refrain from an offence which he would have committed had he believed there was no future state? No man can answer with certainty. Does the fact that a man believes in the Christian religion furnish legal evidence that in a particular case he has not violated the laws of God, or of his country?

Experience teaches us that not only believers in the Christian religion, but those who for years have had the highest evidence that they might expect the ultimate reward of the true Christian, are guilty of grave offences, moral and legal. The law takes man as he is, with his passions, his appetites, his infirmities, and with his education, his moral training, and his religion. With all these elements, his life is a struggle and a contradiction. What his actions will be, can be determined by no form of belief, and by no fixed principle of law. Each man's case will be different from that of his neighbor, and from day to day will be different from his own.

The "Infidel" is one who does not recognize the inspiration or obligation of the Holy Scriptures, or the generally recognized features of the Christian religion. The "Atheist" is one who does not believe in the existence of a God.

The result of this absence of belief upon his actions is speculative entirely. Does his soul shrink back at the idea of annihi- Paradise. On the one side would stand the idea of annihilation; and on the other, that of an offended God.

Who can say, as a matter of fact, which would produce the strongest effect upon the human mind? Is there any feeling or principle stronger than that instinctive dread of death which all men feel, and which neither the faith of the Christian, nor the reasoning of the Atheist can overcome? It does not depend upon life or faith. It is instinctive and common to all men.

It would, in my judgment, be incompetent to impeach one's conduct, and to adjudge one's motives and principles, upon the proposed idea. To adjudge that a man's belief in Christianity will prevent, or tend to prevent, the commission of suicide, or

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that Atheism will produce, or tend to produce, a contrary effect, is to adopt a principle more subtle and speculative, more uncertain and more remote, than the law can recognize. If a sound argument, it would be applicable, to some extent, in every case where character was in evidence. Would it be a just ground of impeachment of the good character of a party to an action that he is an Infidel, or an Atheist? If Gibson had been the Plaintiff in an action of slander, could his opponent have reduced his damages by showing his belief in these respects? If he had been indicted for murder, and the question of character had been introduced into the issue, could the prosecution have attacked him by showing his scepticism? Or could he have sustained his character by proof that he held a religious belief? Such a suggestion finds no countenance in the authorities. Conduct and life, as distinguished from belief, give the standard of character.

In law it would be a totally immaterial circumstance. It affords no certain or practical test of conduct. The offer in the present case is based upon the same idea; and the argument in its defence, although plausible and attractive, cannot be sustained.

Judgment should be affirmed, with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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CHARLES A. BAUDOUINE *v.* HENRY HART.

Promissory Note—Endorsement—Fraudulent Representations.

CLERKE, J.—This was an action on a promissolry note by the endorsee against the endorser. It was transferred to the Plaintiff, before maturity, in part payment of a stock of goods sold by him to the maker. The Defendant alleged that his endorsement was procured by fraud, and offered to prove by Callender, the maker, that he communicated to the Defendant various representations set forth in his answer, which had been made by the Plaintiff to him to induce the Defendant to endorse the note. These representations, he alleged, were untrue. The counsel for the Plaintiff objected to the evidence, and the Judge sustained the objection, unless the Defendant would prove a combination between the Plaintiff and Callender to procure the endorsement.

Afterwards the Plaintiff's counsel consented that any proof might be introduced, and that the pleadings be considered as amended according to the facts. The Defendant's counsel then introduced the Plaintiff to prove the alleged fraud, but no fraud was proved. Plaintiff proved the sale, and that the note was given in part payment of a stock of goods sold for $5,000.

The judgment should be affirmed, with costs, and ten per cent. damages.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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GEORGE CLARKE, APPELLANT, v. GEORGE TUNNICLIFF AND HENRY H. RATHBUN, RESPONDENTS.

Costs—Statute in relation to School Trustees—Certificate of Good Faith.

Where trustees of school districts are called upon to answer for acts done by them in virtue, or under color of their offices, and it appears that they have acted in good faith, they are entitled to a certificate of the Judge who tried the cause, to that effect, that they may be exonerated from the payment of costs.

And when such certificate has been granted, it is error to tax such trustees with the costs in such case.

APPEAL from an order of General Term of Sixth District affirming order of Special Term.

The action was brought against the Defendants to recover damages for taking and converting a horse of the Plaintiff. The Defendants attempted to justify by showing that they were trustees of a school district; that a tax was voted by said district; that as trustees they assessed such tax against the taxable inhabitants of the district, and persons holding land therein, and made out the proper tax-list, upon which assessment and tax-list the Plaintiff was assessed for a farm, owned and worked by him, as being in said district; and that they annexed to the tax-list a warrant, directed to the collector, who, by virtue thereof, after the Plaintiff refused to pay the tax, levied on, and sold the horse in question, to satisfy a tax against the Plaintiff. On the trial it was held that the tax was unauthorized, and the Plaintiff had a verdict for $291.04 damages. Exceptions were taken upon the trial, which were ordered to be heard, in the first instance, at the General Term, and a new trial was denied, with costs.

After the verdict the Defendants' attorney applied to the Judge, who tried the case, for a certificate that it appeared upon the trial that the Defendants had acted in good faith, &c. (2 R. S. 128, § 198, 5th ed.), which was subsequently,

Costs—Readjustment. 10 *Hun,* 567; 3 *T. & C.* 764.
School trustees—Statute in relation to. 19 *Hun,* 613.

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after the decision at General Term, made by the Judge. On the adjustment of the Plaintiff's cost, they were taxed, including costs on motion for a new trial, at $401.34; but the certificate of the Defendants' good faith being presented to the Clerk, he refused to insert them in the entry of judgment. The Plaintiff moved, at Special Term, for an order directing the Clerk to insert them, and the motion was denied.

The Plaintiff appealed to General Term, and the order was affirmed; and now he appeals to this Court.

S. I. Burditt for Appellant.
D. C. Bates for Respondents.

MILLER, J.—The recovery of the Plaintiff in this action was had by reason of the illegal proceedings of the Defendants as trustees of a school district, in assessing a tax upon the Plaintiff, and in collecting said tax by a sale of his property. Ordinarily, a recovery in such an action would entitle a Plaintiff to costs; and if the Defendants are now exonerated from the payment of costs, it is because they are exempted by section 146 of chap. 480 of the Laws of 1847, which provides that when officers of school districts are prosecuted for any act performed by virtue of, or under color of their offices, which might have been the subject of an appeal to the Superintendent, no costs shall be allowed to the Plaintiff, where the Court shall certify that it appeared upon the trial of the cause of the Defendants acted in good faith.

I think the Judge who tried this cause at the Circuit was warranted in granting a certificate, within the provision of the section of the act referred to, and that the Defendants were thereby relieved from the payment of costs. By section 82 of the act in question the trustees are required to call meetings, to make out a tax-list of every district-tax voted, and to annex a warrant to any such tax-list, directed to the collector, for the collection of the sum assessed. Another section (85) requires the trustees, in making out the tax-list to apportion the tax among the taxable inhabitants of the district, and upon the real estate of non-residents liable to taxation. A subse-

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quent section (132) authorizes an appeal by any person conceiving himself aggrieved in consequence of any decision made in certain cases, which are particularly specified, "or concerning any other matter" arising under the act in question, to the Superintendent, who is authorized and required to examine and decide the same, and whose decision is final and conclusive.

The provision of the section last cited is broad and comprehensive in its terms, and evidently includes any and all acts which may possibly arise in regard to the official proceedings of these officers. It certainly embraces the acts of the Defendants in this case, in the assessment and collection of the tax against the Plaintiff.

The Legislature, no doubt, intended to prevent needless prosecutions, and unnecessary suits against officers of this character, who had acted in good faith in the discharge of their official duties, and, I think, provided an ample remedy for redress in the case before us, without resort to a Court of Law. The acts of the Defendants, for which they were held liable, were for assessing the tax, and instituting and carrying out the proceedings required by law for its enforcement and collection. This clearly was a decision concerning a matter within the letter, spirit, and meaning of the act in question, which it was especially intended to provide for, and the legality of which was litigated upon the trial. The injury to the Plaintiff arose in consequence of the decision of the trustees, that the Plaintiff was liable to be assessed, and the warrant of assessment issued by them. The levy made upon, and the sale of the Plaintiff's property was the result of the unlawful assessment made by the Defendants. Here was the original grievance for which a complete and perfect remedy was provided by an appeal, and which rendered the commencement of a suit a useless proceeding, nor does it alter the case because the Plaintiff was not a resident of the district. The statute does not exclude non-residents whose real estate is liable to tax, but expressly comprehends every person aggrieved.

It was enough that the Plaintiff was aggrieved by the decision of the Defendants to levy the tax, to bring him within

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the provision of the act, and that the whole question involved in the suit brought could have been appealed, heard and decided by the Superintendent, instead of being contested and adjudicated in an action in a Court of Justice. So long as the Defendants were acting as trustees of the school district, and were called upon to respond for acts done by virtue of, or under color of their office, and acted in good faith, they presented a case which entitled them to the certificate of the Judge who tried the case, and which exonerated them from the payment of costs (Ex parte Bennett, 3 Denio, 175).

It is insisted by the Plaintiff's counsel that § 304 of the Code allows costs of course to the Plaintiff, in a case like the one under consideration; that § 468 of the Code repeals all statutory provisions inconsistent with the Code, and that by means thereof § 146 of the act of 1847 is abrogated and repealed.

I think this view of the subject is not maintainable, and that the position assumed in the opinion of the General Term, that the scope of §§ 304, 305, and 306 of the Code is to distinguish between the cases in which costs are allowed of course, and those in which they are discretionary, and not to make their allowance peremptory in every case specified in § 304, and that the reason given for upholding it is a satisfactory and full answer to the ground taken by the Plaintiff's counsel. As was well said by the learned Judge who wrote the opinion: "The intent is manifest, that in the first class of cases costs are not left to the discretion of the Court, while in the latter class they are so left."

This intent is more apparent from the enactment in § 303, which abolishes the fee bill previously existing, and enacts that "there may be allowed" to the successful party "certain sums, by way of indemnity, for his expenses in the action," and afterwards distinguishes the cases in which the costs are allowed of course, and those in which they are discretionary.

It may also be observed, that although costs are allowed to the Plaintiff, under § 304, in cases of the same nature as the present one, and unless the Judge interposes and grants a certificate, yet the fact of granting the certificate is not in conflict

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with this enactment. The party recovers costs of course, unless their allowance is stayed by the certificate, as provided; and this, I think, is only a mere modification of § 146 of the act of 1847, not inconsistent with the Code, and not repealed by § 468 of the Code.

The certificate of the Judge applies, I think, to all the costs in the case, and the Plaintiff is not entitled to his costs on this motion for a new trial. The exceptions taken upon the trial were first heard at General Term, by the order of the Court, and the motion for a new trial was only a continuation of the action, and not the institution of a new proceeding by the Defendants. The Defendants were merely pressing their defence originally interposed on the hearing at General Term, and the certificate of the Judge who tried the case was not given until after a decision had been made upon the exceptions. The denial of the motion for a new trial, "with costs," was the usual form of an order in such cases, and not an adjudication that the Plaintiff was entitled to costs, and which would preclude the Defendants from obtaining the certificate. The Plaintiff in such a case would be entitled to costs, as a matter of course, upon the decision, the same as he would upon a verdict at the Circuit, and therefore the form of the order was not inappropriate, but the granting of the certificate prevented the allowance of the costs, by the Clerk, upon taxation.

As the views expressed are against the Plaintiff upon the question raised, and necessarily lead to an affirmance of the order of the General Term, it is not necessary to discuss whether the order of the General Term was of such a character as to authorize an appeal to this Court.

Order appealed from affirmed.

JOEL TIFFANY,
State Reporter.

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THOMAS FITZGERROLD, PLAINTIFF IN ERROR, *v.* THE PEOPLE, DEFENDANTS IN ERROR.

Homicide—Indictment—Statute of 1862—Murder—First and Second Degrees.

To charge in an indictment for murder that the prisoner committed the act "with malice aforethought," is equivalent to the averment that the act was committed "with a premeditated design to effect the death," &c.

Murder in the second degree, under the Statute of 1862 (ch. 197, p. 369), consists in killing a human being by a person engaged in the commission of a felony, where such killing does not, according to the statute, constitute murder in the first degree, or manslaughter, or excusable homicide.

Held, also, that the entire effect of the amendment of 1862 (ch. 197) was this: When the killing was perpetuated without any design to effect death, by a person engaged in the commission of a felony other than that of arson in the first degree, it was murder in the second degree.

THE Plaintiff in Error was tried in the county of Westchester, for the murder of one Ellen Hicks. The jury found a general verdict of guilty. The Court sentenced the prisoner to be hung, and a judgment to that effect was entered in the minutes of the Court. The prisoner obtained the allowance of a writ of error, and a stay of proceedings. The General Term of the Second District affirmed the judgment, and the prisoner now brings his appeal to this Court. The indictment was in the following words, omitting the caption and scilicet:

"The jurors of the people of the State of New York, in and for the body of the county of Westchester, upon their oath and

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Indictment—Proof under—Common Law form. 156 *N. Y.* 307; *D.* 173 *N. Y.* 141; 138 *N. Y.* 84 (51 *St. Rep.* 729); 51 *App. Div.* 144 (64 *N. Y. Supp.* 580); 67 *How. Pr.* 460; 42 *Hun,* 84 (3 *St. Rep.* 490; 25 *Week. Dig.* 191; 5 *N. Y. Crim.* 55); 2 *N. Y. Crim.* 306; 22 *N. Y. Supp.* 691; 11 *St. Rep.* 64 (27 *Week. Dig.* 427).

Murder—First and second degree—What constitutes. 39 *N. Y.* 40 (5 *Abb. N. S.* 115); 39 *N. Y.* 250 (5 *Abb. N. S.* 152); 40 *N. Y.* 353 (7 *Abb. N. S.* 79); 43 *N. Y.* 570; 50 *N. Y.* 602; 53 *N. Y.* 180; 56 *N. Y.* 211; 78 *N. Y.* 500; 80 *N. Y.* 514; 50 *How. Pr.* 210; 6 *Park.* 229.

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affirmation, do present: That Thomas Fitzgerrold, Michael J. Canty, John Doran, Michael Martin, John C. Burke, and Charles Burke, late of the town of Westchester, in the county of Westchester aforesaid, on the second day of August, in the year of our Lord one thousand eight hundred and sixty-six, with force and arms, at the town of Westchester aforesaid, in the county aforesaid, in and upon one Ellen Hicks, in the peace of God and of the said people then and their being, feloniously, willfully, and of malice aforethought, did make an assault; and that the said Thomas Fitzgerrold, a certain gun (called a musket), of the value of ten dollars, then and there charged with gunpowder and a leaden bullet, which gun he, the said Thomas Fitzgerrold, in both his hands then and there had and held, at and against the said Ellen Hicks, then and there feloniously, wilfully, and of his malice aforethought, did shoot off and discharge, and that the said Thomas Fitzgerrold, with the leaden bullet aforesaid, by means of shooting off and discharging the said gun, so loaded, to and against the said Ellen Hicks, aforesaid, did then and there feloniously, wilfully, and of malice aforethought, strike, penetrate, and wound the said Ellen Hicks in and upon the body of the said Ellen Hicks, near the navel, giving to her, the said Ellen Hicks, then and there, with the leaden bullet aforesaid, by means of shooting off and discharging the said gun so loaded to and against the said Ellen Hicks, and by such striking, penetrating and wounding the said Ellen Hicks as aforesaid, one mortal wound in and through the body of her, the said Ellen Hicks; of which said mortal wound the said Ellen Hicks did then and there soon after die.

"And the jurors aforesaid, on their oath and affirmation aforesaid, do further present: That the said Michael J. Canty, John Doran, Michael Martin, John C. Burke, and Charles Burke, then and there, feloniously, wilfully, and of malice aforethought, were present, aiding, helping, abetting, comforting, assisting, and maintaining the said Thomas Fitzgerrold in the felony and murder aforesaid in manner and form aforesaid to do and commit.

"And the jurors aforesaid, upon their oath and affirmation

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aforesaid, do say that the said Thomas Fitzgerrold, her, the said Ellen Hicks, in the manner and by the means aforesaid, feloniously and of his malice aforethought, did kill and murder; and that the said Michael J. Canty, John Doran, Michael Martin, John C. Burke, and Charles Burke, then and there, feloniously, wilfully, and of malice aforethought, were present, aiding, helping, abetting, comforting, assisting, and maintaining the said Thomas Fitzgerrold in the felony and murder aforesaid, contrary to the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity."

Francis Larkin for the Plaintiff in Error.

John S. Bates for the Defendants in Error.

HUNT, CH.J.—The prisoner alleges that the indictment charges only the offence of murder in the second degree. It does not allege that the killing was from a premeditated design to effect the death of any human being, nor that it was perpetrated by an act imminently dangerous to others, evincing a depraved mind, regardless of human life, nor that it was perpetrated in committing the crime of arson in the first degree. The killing is charged to have been by "wilfully, maliciously, and of malice aforethought" shooting the said Ellen Hicks upon her body, and inflicting upon her a wound from which she speedily died. This, the prisoner insists, is a charge of murder in the second degree only, and that the sentence and judgment, rendered upon a general verdict of guilty, are erroneous.

The killing of any human being, without the authority of law, is declared by the Revised Statutes (omitting the distinctions in reference to manslaughter and excusable or justifiable homicide) to be "murder" in the following cases:

1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being;

2. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual;

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3. When perpetrated without any design to effect death, by a person engaged in the commission of any felony (2 R. S. 657, § 5).

The case of The People v. Enoch arose soon after the passage of these statutes (13 Wend. 159). Enoch was indicted for murder, upon a charge that on, &c., he did with force and arms, "feloniously, wilfully, and of his malice aforethought," shoot and kill his wife, Nancy Enoch. He was convicted and sentenced to be hung. Upon a writ of error brought, it was insisted by his counsel that the verdict and sentence could not be upheld, because a common law indictment "with malice aforethought" could be sustained by proof of killing, without a design to effect death, if such death happened in the perpetration of a crime or misdemeanor not amounting to felony; whereas, by the Revised Statutes, such an offence did not amount to murder (2 R. S. 657, § 5). The judgment was affirmed by the late Supreme Court, and upon appeal to the Court of Errors, was affirmed by that Court also. The Supreme Court say that the first subdivision was intended to define murder in the case of express malice, and the second and third subdivisions in cases of implied malice. Judge Nelson (p. 164) uses this language: "Malice aforethought, in common parlance, and as originally used, conveyed only the idea of express malice. Its meaning had been enlarged, so as to include implied malice, by judicial construction; to define and limit which was the object, and has been the only effect of the fifth section, above referred to. It was said on the argument that, under this indictment, the jury might have convicted the prisoner upon proof of implied malice, which, since the Revised Statutes, would only amount to manslaughter, but which evidence would sustain the terms of the indictment, 'malice aforethought,' and justify a conviction of murder from implied malice at common law. So it might have been said before those statutes, on a conviction of murder upon a similar indictment, that the jury might have convicted the prisoner upon proof which did not amount to murder, but only to manslaughter, as evidence of the latter offence was admissible under

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it. * * The answer to all this is, that it is the business and duty of the Court to see that a proper direction be given to the jury in point of law upon the evidence, and if either Court or jury err, the appropriate remedy must be sought." He proceeds: "The statute has not altered the common law. The offence of murder, as defined in the Revised Statutes, was so before the statute, and is but the adoption or introduction into the act of the common law description of the crime. The sixteenth section limits the offence to the cases mentioned in the fifth section, above cited; or, in other words, abolishes the offence at common law, except in those cases, and they are left as before existing in our criminal code. The cases of murder from implied malice have been limited by the second and third subdivisions of the fifth section; but those there defined existed before. The crime of murder might have been committed before the Revised Statutes, from implied malice, where the prisoner, while engaged in an unlawful act, under the degree of felony, such as a riot or other misdemeanor, killed another against his intention. By the third subdivision, such unlawful act must now be of the degree of felony. This is the only modification of the law of murder. The rule that the indictment should bring the offence within the words of the statute declaring it, is applicable only in its strict terms to cases where the offence is created by statute, or where the punishment has been increased, and the pleader seeks to bring the prisoner within the enhanced punishment."

In the Court of Errors (at p. 173, et seq.) the Chancellor reiterates these views at length, and concludes by saying: "From this examination of the subject I have arrived at the conclusion that a common law indictment for murder is proper, under the provisions of the Revised Statutes; and a Defendant cannot be convicted on such an indictment of a felonious homicide with malice aforethought, unless the evidence is such as to bring the case within the statutory definition of murder" (p. 176). In The People *v.* White (24 Wend. 520) the late Court of Errors held, that when an indictment charged the killing to be feloniously, wilfully, of malice aforethought, and from a

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premeditated design to effect death, the premeditated design or express malice must be proved, but affirm and approve the case of Enoch. In The People *v.* Clark, decided in this Court in 1852 (3 Seld. 385, 393), Johnson, J., uses this language: "The words premeditated, aforethought, and prepense, possess, etymologically, the same meaning; they are in truth, the Latin and Saxon synonyms, expressing a single idea, and possess in law precisely the same force. The statute, so far as this term is concerned, has not altered the law. Malice prepense, however, had attained a broader meaning than belongs to the term premeditated design. The intent to take life was not necessary to constitute malice prepense. Even express malice, or malice in fact, is defined to be a deliberate intention of doing *any* bodily harm to another, unauthorized by law (Hale's P. C. 451), and by no means necessarily involved an intent to take life. * * The degree of deliberation is not different from that required by the common law. * * It is enough that the intention precedes the act, although that follows instantly."

In 1862 (Laws 1862, ch. 197, p. 369) the law on the subject of murder was re-enacted, and was altered in its third subdivision. By the Revised Statutes, as already quoted, it was provided that the killing should be murder in the cases specified, of which the last was as follows: "3. When perpetrated without any design to effect death, by a person engaged in the commission of any felony." By the statute as altered it was made to read as follows: "3. When perpetrated in committing the crime of arson in the first degree. Such killing, unless it be murder in the first degree, or manslaughter, or excusable or justifiable homicide, as hereinafter provided, or when perpetrated without any design to effect death, by a person engaged in the commission of any felony, shall be murder in the second degree." By this amendment, a killing when perpetrated in committing the crime of arson in the first degree, still constituted the offence of murder in the first degree. When, however, the killing was perpetrated without any design to effect death, by a person engaged in the commission of a felony, other than that of arson in the first degree, it was

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murder in the second degree only. This was the entire effect of the amendment of 1862. This section is obscure, and has been generally read as if the words "or when perpetrated without any design to effect death, by a person engaged in the commission of any felony," formed an exception, like the words "or manslaughter," or "justifiable homicide." Upon this construction no crime of murder in the second degree is created. The very crime intended to be thereby created, is by this construction declared not to be such crime. A more reasonable construction should be put upon the language, and effect given to the evident intention of the Legislature. The statute may be thus paraphrased: The killing of a human being shall be murder in the first degree—First, when perpetrated from a premeditated design to effect the death of the person killed, or of any human being. Second, when perpetrated by an act imminently dangerous, &c. Third, when perpetrated in committing the crime of arson in the first degree. Such killing, unless it be murder, or manslaughter, or excusable or justifiable homicide, as hereinafter provided, shall be murder in the second degree, when perpetrated without a design to effect death, by a person engaged in the commission of any felony. This was the evident intent of the framers of the statute, and, in my judgment, is a justifiable construction of the language. Or again, it may be read thus: Such killing, when perpetrated without any design to effect death by a person engaged in the commission of any felony, shall be murder in the second degree, unless it be murder in the first degree (as above defined), or manslaughter, or justifiable or excusable homicide, as hereinafter provided.

The punishment of murder in the second degree is fixed, by section seven, as an imprisonment in a State prison for a period of not less than ten years.

The construction which I have given to this statute is confirmed by the subsequent provisions of the statute, on the subject of manslaughter. This offence in the first, second, and third degrees, is defined by the statutes, and the punishment is fixed at confinement in the State prison, for periods ranging

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from two to seven years. The nineteenth section of the statute provides that every other killing of a human being shall be deemed to be manslaughter in the fourth degree. The punishment of this offence is by imprisonment in a State prison for two years, or by imprisonment in a county jail not exceeding one year, or by fine not exceeding $1,000, or by both such fine and imprisonment.

It has been suggested that the killing of a human being, when perpetrated without a design to effect death, by a person engaged in the commission of a felony, might be punished within the terms of section nineteen, and that constitutes the offence of manslaughter in the fourth degree. This would be quite unwarrantable, when we consider the very slight degree of punishment inflicted by that section, compared with the magnitude of the offence, and the greater punishment inflicted for the commission of much lighter crimes, as defined by the three preceding degrees of manslaughter. I feel therefore quite justified in making the assertion, that unless the crime of murder in the second degree consists in what I have defined it to be, it is entirely unprovided for in the statute. This is an absurdity not to be tolerated.

The prisoner's argument, in legal effect, is this: that he is charged by the indictment with an offence which may be found by the jury to be either murder in the first degree, or murder in the second degree; that the jury have found a general verdict only against him; that this may have been founded upon facts which would justify a conviction of the minor offence only, and that therefore a judgment based upon a verdict as for the greater offence is erroneous. This argument I do not consider sound. In the People v. Enoch (supra), it was charged that the Defendant killed his wife feloniously, and of malice aforethought, the words, "with premeditated design," being omitted. The law had then been so altered by the Revised Statutes, that a killing which occurred in commission of a misdemeanor simply, was not murder. It would be manslaughter merely. Malice aforethought embraced a class of offences which did not then constitute the crime of murder.

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The prisoner then stod indicted for an offence which might be murder, or might be an inferior offence, and yet upon a general verdict of guilty, and a judgment inflicting the punishment of death, the Court of Errors sustained the judgment. The Chancellor gave the answer which I have already cited, "that is the duty of the Court to see that a proper direction be given to the jury in point of law upon the evidence, and if either Court or jury err, the appropriate remedy must be sought." No objection is taken to the charge of the Judge in the present case, and we are to assume that the Judge explained to the jury the law of murder in its different degrees, and the law of manslaughter, as defined by the statute, and that the jury rendered an intelligent verdict upon such understanding of the statutes. If this case had contained the charge of the Judge, in which it had been stated that to constitute murder in the first degree it must appear to them that the killing was from a premeditated design to effect the death of a human being, or that it was perpetrated by an act imminently dangerous to others, evincing a depraved mind, regardless of human life, or when committing the crime of arson in the first degree, and that if perpetrated when engaged in the commission of any other felony, it would be murder in the second degree only, the charge would have been correct, and a general verdict would have justified the sentence given. We are to presume that the law was thus explained to the jury, and that they fully appreciated the effect of their verdict. The absence of an objection admits it.

It has always been held to be the law, that upon an indictment charging the offence of murder, and nothing elese, the prisoner might be convicted of manslaughter. The same allegations in the indictment would maintain a conviction for murder, or would justify a verdict of manslaughter merely. The result depends upon the proof, the direction of the Judge, and the opinion of the jury. As these elements require a conviction of the greater or minor offence, such will be the result. As the same elements require a conviction of murder in the

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first degree, or of murder in the second degree, such will be the result.

The case of Enoch has stood as the law on this subject for more than thirty years. To overrule it would be a rash overthrow of a settled authority, under which many persons have suffered the extreme penalty of the law. The objection on which the prisoner's argument is based, is purely technical; it is not even sugested that the law was not accurately explained to the jury, or that his rights were not properly guarded.

WOODRUFF, J.—The Plaintiff in Error, was indicted, tried, found guilty, and sentenced to death, at the Court of Oyer and Terminer, for the county of Westchester. By writ of error the judgment was brought under review at the General Term of the Supreme Court for the Second District, and was there affirmed; and the Court thereupon appointed a day for the execution of the sentence. A writ of error was thereupon sued out by Plaintiff in Error, and the proceedings were thereby removed to this Court, and a stay of execution until the further order of this Court was obtained.

The indictment charged that the Plaintiff in Error, feloniously, wilfully, and of malice aforethought, made an assault upon one Ellen Hicks, with a gun, charged with gunpowder and bullet, which he held in his hands, and at and against the said Ellen Hicks, did feloniously, wilfully, and of his malice aforethought, shoot off and discharge, and with such bullet, by means of the shooting off and discharging the said gun, the said Fitzgerrold did, then and there, feloniously, wilfully, and of his malice aforethought, strike, penetrate, and wound the said Elen Hicks, giving to her * * one mortal wound, * * of which said mortal wound, the said Ellen Hicks did, then and there, soon after die. * * * And the jurors aforesaid, * * say, that the said Fitzgerrold, her the said Ellen Hicks, in the manner and by the means aforesaid, feloniously and of his malice aforethought, did kill and murder. * * *

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It is insisted, on behalf of the Plaintiff in Error, that the offence of murder in the first degree is not charged in the indictment, and that therefore a verdict of guilty does not warrant a judgment condemning the Plaintiff for that offence.

In 1834, the Court of Errors of this State, in The People *v.* Enoch (13 Wend. 159), by an unanimous opinion, affirmed the judgment of the Supreme Court, which held that an indictment charging the act to have been committed feloniously, wilfully, and of his malice aforethought, was a sufficient charge of murder in the first degree, although the Revised Statutes then defined murder as a killing in the following cases:

1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being.

2. When perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

3. When perpetrated without any design to effect death, by a person engaged in the commission of any felony (2 R. S. 657, Part 4, ch. 1 § 5).

The present statute (Laws of 1862, p. 369, ch. 197) defines murder in the first degree in the same terms, except that the third subdivision reads, "when perpetrated in committing the crime of arson in the first degree."

Under the indictment above mentioned Enoch was convicted of murder, sentenced to be hung, and the conviction and judgment thereon was sustained.

The ground was distinctly taken, and ably and elaborately argued, that the charging the act to have been with malice aforethought, was not a sufficient description of a killing with a premeditated design, and that therefore the conviction should not be sustained. And the precise argument now urged upon us was there earnestly pressed, viz.: that "had the accused, on his arraignment, pleaded guilty to the charge, the Court would not have known what judgment to pronounce"—*i. e.,* whether the punishment of murder in the first degree, death; or of manslaughter, imprisonment in the State prison.

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The Court were of the opinion and held, that the statute had not changed the form of pleading or the requisites of an indictment. That the words, "with malice aforethought," include express malice, which is all that is expressed or intended to be expressed by "premeditated design," and are legal and appropriate language to express it. The opinion of the Chancellor in the Court of Appeals was, that murder being a common law offence, and the law having adopted certain technical expressions to define the offence, the crime must be described in the indictment, or the intention be expressed in those technical terms, and no other. And that therefore in an indictment for murder, the terms murder, of his malice aforethought, are considered absolutely necessary, and without them it would be deemed a case of manslaughter.

This case clearly and necessarily sustains the indictment now in question. It holds that the statute has introduced no new rule of pleading to describe a killing with permeditated design; that the Court, on the trial, must instruct the jury as to what should be proved to sustain such an indictment, and in the giving of such instructions the statute is a guide, and any error in such instructions is to be corrected on exception thereto.

The decision in The People *v.* Enoch was affirmed by the Supreme Court in The People *v.* White (22 Wend. 167). There the pleader, in order to avoid question, had added to the charge of killing "with malice aforethought," the words of the statute—"and from a premeditated design to effect his death," &c. The Supreme Court held that these latter words were unnecessary and mere surplusage. That the other words, being in the form of a common law indictment, let in proof of any species of murder as defined by the section of the statute. Hence, that the words "with premeditated design," &c., might be rejected or disregarded.

The Court of Errors (24 Wend. 520) held that the pleader, by introducting the words "with premeditated design," &c., had adopted them as descriptive of the specific act charged, viz.: the description in the first subdivision of that section of the statute which defines murder, and as matter of description he

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had made them material. But the opinion of the Court showed that the words were not necessary to the validity of the indictment, and so far from retracting or reversing the decision of the same Court in The People *v.* Enoch, language of direct affirmance is used in the opinion. Thus (p. 580): "Since the decision in the case of Enoch by this Court, no doubt can be entertained that a common law indictment, charging the offence to have been committed of *malice aforethought,* would be good for either of the offences described in the first or second subdivision of the section. Had the indictment been so drawn, and without the words 'with premeditated design,' &c., no doubt could be entertained that the charge of the Court to the jury would have been correct, and the conviciton good." (P. 571): "It is true that, according to the reason of the thing, as well as the decision of this Court in The People *v.* Enoch, a general count charging murder *with malice aforethought* would be sufficient, and would be sustained by evidence of any sort of murder whatsoever within the statutory definitions."

These decisions involve no discussion of the extent to which the manner of the killing must be described, in order to avoid a variance and let in proof of the actual facts. Such a description will, in general, show to which subdivision of the statute the charge refers. But that it is not necessary to use the words "with premeditated design," &c. in order to constitute a valid indictment, and that such design is sufficiently alleged in the charge, "with malice aforethought," is the clear doctrine of these cases.

In The People *v.* Clark, in this Court (7 N. Y. 385), no question arose on the form of the indictment. The inquiry was, what degree of deliberation was essential to constitute premeditated design; but in the discussion, Mr. Justice Johnson says that the words "premeditated, aforethought, and prepense, possess, etymologically, the same meaning, and are * * synonyms, expressing a single idea, and possess in law precisely the same force." But as "malice prepense" had obtained a broader meaning than belongs to "premeditated design," the statute required, in order to a conviction of murder under the

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first subdivision, the existence of an actual intention to kill. The existence of such intention must therefore be proved on the trial, to sustain such an indictment under the first subdivision.

The result of these cases most clearly is, that the crime of murder is sufficiently charged, when alleged, as in the present indictment, "with malice aforethought." But, in order to prove the crime, the proofs must establish a case within the requirement of the statute in one of its three subdivisions. And the party indicted is entitled to proper instructions to the jury as to what facts must be found to sustain the indictment. And a verdict of guilty, as charged in the indictment, is a finding of guilty of murder in the first degree; and a judgment thereon, and condemnation to the punishment awarded to that crime, necessarily follow.

I find no reason for departing from these views of the law. If I doubted their accuracy, I should hesitate in disturbing cases which have been the guide of public officers and the test of correct pleading for more than thirty years, unless I saw that some wrong was done or some evil was created by continuing a form of indictment so long approved, the meaning, force, and effect of which was well understood, so that no party indicted could possibly be surprised or placed at disadvantage on the trial, if the law was rightly declared to the jury; and if in that respect there was error, that may be corrected.

I have, however, no doubt on that subject. I think the decision in The People *v.* Enoch founded in good sense and correct in law, and that it is decisive in the case before us.

In a case in which the questions raised involve the life of a human being, I was disposed to consider carefully what could be urged by the counsel for the Plaintiff in Error, although the case did not seem doubtful; but the result of such consideration is, that the judgment must be affirmed.

MASON, J.—The prisoner was indicted for the crime of murder, at the Court of Oyer and Terminer in the county of Westchester. The indictment is in the old common law form, and

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is precisely like the form in the case of The People *v.* Enoch (13 W. R. 159). It charges that the said Thomas Fitzgerrold, feloniously, wilfully, and of his malice aforethought, did kill and murder Ellen Hicks, by shooting her through the body with a leaden bullet, discharged from a musket in the hands of the said Thomas Fitzgerrold, &c.

The prisoner was tried upon said indictment, at the Westchester Oyer and Terminer, in 1867; and the jury returned a general verdict of guilty, and the Court sentenced the prisoner to be hanged; and thereupon the prisoner procured a writ of error, and removed the case to the Supreme Court, where the judgment was affirmed; and the prisoner then removed the case into this Court, by writ of error, and now claims and insists that the judgment should be reversed, for the reason that the verdict of the jury upon the indictment did not find the prisoner guilty of murder in the first degree; or at least the Court were not justified in sentencing the prisoner to the punishment of death upon the verdict; and the question raised brings under review both the indictment and the verdict of the jury thereon. The rule in criminal trials is, that the fact of guilt being ascertained and declared *by the jury,* the Court determines the punishment which the law prescribes for the offence (Duffy *v.* The People, 26 N. Y. R. 592, and the cases there cited.)

There is no doubt in my mind but this indictment, upon well-settled principles of law, charges upon the Defendant the crime of murder in the *first degree,* and the jury having found a general verdict of guilty, it became the duty of the Court of Oyer and Terminer to pronounce the judgment which they did.

The fact of guilt being ascertained and declared by the jury, the Court must determine the punishment which the law prescribes for the offence. The point made by the Defendant against the conviction and judgment in this case, is that the verdict of the jury does not find the Defendant guilty of murder in the first degree, because they have only found him guilty of the offence charged in the indictment; and that because the indictment does not charge that the killing was perpetrated

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from a premeditated design to effect the death of the person killed, the offence of murder in the first degree is not found by the verdict. There are several answers to this objection. In the first place, it is a settled rule of the common law that the killing of a human being is unlawful, and primâ facie murder (Foster's Crown Law, 253). The killing is presumed in law to be felonious and malicious until the contrary is shown in evidence, and the burden is upon the Defendant to prove it (4 Black. Com. 201; 3 Chitty's Cr. Law, 730; Barbour's Cr. Treatise, 25); and consequently the general rule of pleading at common law is, that in the crime of murder it is not necessary to aver, "in hæc verba," the particular intent. It is also a rule of pleading in criminal cases, that presumptions of law need never be averred (4 Maul. & Selw. 105; 2 Wils. R. 147; Barb. Cr. Tr. p. 77).

Nor is it necessary in the indictment to aver conclusions of law. It is sufficient to state the facts, and the Court will draw the inferences (2 Leach, 941; Barb. Cr. Tr. 277).

As a general rule in criminal cases, intention can be but a matter of presumption, arising either from the facts stated in the indictment, or from extrinsic facts stated in evidence (arch. Cr. Pl. 124). Now, applying this rule to the charge in this indictment, it cannot be doubted that an intent to kill is imputed. A musket loaded with powder an a leaden bullet is fired by the Defendant at the deceased; she is shot through the body and killed. This is the charge. The common law rule of evidence to be applied to this case is, that the prisoner intends what he performs and effects, where the effect is the ordinary result of his act (2 Stark. Ev. 739; 3 Maul. & Selw. R. 15). In other words, the laws infers that every man must contemplate the necessary consequences of his own acts (Arch. Cr. Pl. 124; Rex *v.* Dixon, 3 Maul. & Selw. 15).

It cannot be doubted that this indictment embraces the charge of a killing in express malice, or from a premeditated design to effect the death of deceased. But it is said that the charge in this indictment also embraces a lower grade of offence, to wit, implied malice, and may apply to that, and, consequently,

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a general verdict of guilty does not necessarily convict the prisoner of the higher offence of killing from a premeditated design to effect the death.

The answer to this is, that a general verdict of guilty has always been held to convict the prisoner of the highest offence charged in the indictment; and although lower offences were charged in the indictment, yet the Court, on a general verdict of guilty, might lawfully sentence the prisoner for the highest offence implied. This rule was expressly sanctioned by this Court where I applied the rule in the Oyer and Terminer, in the case of The People *v.* Conkey et al., and sentenced the prisoners for the highest offence charged. In that case there was a general verdict of guilty.

There is little propriety, however, in discussing this case upon general principles, as the whole question was decided in the case of The People *v.* Enoch (13 W. R. 159). That case decides what was familiar and well known to every criminal lawyer before, that the third subdivision of § 5, 2 R. S. 657, was but a re-enactment of the common law definition of murder, so far as it went; and a careful comparison of the language employed in the statute shows that the framers thereof intended to put the common law language into the statute, which they have most fastidiously done.

They did strike down a class of homicides that at common law was held to be constructive murder, where there was no intent to kill, and threw them into a lower grade of manslaughter; yet so far as they retained the crime of murder, it was but a re-enactment of the common law upon the subject. The opinion of Judge Nelson in the Supreme Court, in the case of The People *v.* Enoch, above referred to, and also the opinion of the Chancellor in the Court of Errors in the same case, is very clear and satisfactory upon this subject, and is unanswerable to show that a common law form of indictment, like the one in the present case, is good under the statute, and would justify the imposition of the death penalty upon a general verdict of guilty under it.

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It only remains to see whether the statute definition of murder in the first degre, as embraced in our present statute, has changed this rule. This statute was passed April 12, 1862, and is a literal copy of the 5th sect., 2 R. S. 657, while the statute definition of murder in the R. S. is only changed in the 3d sub. They have limited the cases embraced therein to a homicide committed while engaged in the commission of the crime of arson in the first degree, whereas before it embraced all unjustifiable homicides committed while engaged in *the commission of a felony.*

There is no pretence, and can be none, that this 3d sub. has anything to do with the case under consideration. It follows, therefore, that the case of The People *v.* Enoch is a controlling authority under our present statute. But it may be said that this act of April 12th, 1862, creates a new offence of murder in the second degree. Be it so. Murder in the second degree, as defined in that act, does not embrace any case that was not murder under the Revised Statutes. This, it seems to me, is very clear. This act of 1862 does not propose in any manner to interfere with manslaughter in any respect, as the same is defined in the Revised Statutes. It only interferes with the crime of murder as defined in those statutes, by striking out of the third subdivision of the section every unjustifiable homicide perpetrated without a design to effect death, by a person engaged in the commission of a felony, other than arson in the first degree.

The result of the amendment of 1862 is to leave the first and second subdivisions of this 5th section embraced in the Revised Statutes, murder in the first degree; and when the homicide occurs without a premeditated design to effect death, by a person engaged in the commission of arson in the first degree, such killing is murder in the first degree.

Now, it must be borne in mind that our Revised Statutes, in their provisions as to murder and manslaughter, in the four degrees specified in the statute, embraced every conceivable case of unjustifiable homicide. As this act of 1862 leaves every degree of manslaughter, as defined in the Revised

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Statutes, wholly unmolested, it would seem to follow that murder in the first and second degrees, as embraced in this act of 1862, can only embrace those cases that were murder under the Revised Statutes. As this act of April 12, 1862, is explicit in its definition of murder in the first degree, and makes it embrace all the cases included in the first and second subdivisions of the 5th sec., 2 R. S. 657, and one class embraced in the third sub., to wit, when the killing occurs when engaged in the commission of arson in the first degree, it would seem to follow that the framers of this statute must have intended that all that class of cases thrown out of this third sub. of murder, as embraced in the R. S., should fall into the definition of murder of the second degree. This must be the construction of this act of April 12, 1862, otherwise there is no such thing as murder in the second degree, for no case is left for the statute to operate upon. If murder in the second degree does not embrace this class, there is no such thing as murder in the second degree under this statute.

It does not embrace murder in the first degree, for that is expressly excluded. It does not embrace manslaughter in any of its degrees, as embraced in the Revised Statutes, for they are expressly excluded. It does not embrace a homicide perpetrated without a design to effect death, by a person engaged in the commission of a crime of arson in the first degree, for that is included in the crime of murder in the first degree. What class of cases does murder in the second degree embrace? There is nothing left for this statute to operate upon, except that class of cases carved out of the third subdivision of murder as defined in the Revised Statutes, and which are excluded from the crime of murder in the first degree. In other words, every killing perpetrated without a design to effect death, by a person engaged in the commission of a felony, other than arson in the first degree, is murder in the second degree, else there is no such thing as murder in the second degree, and the enactment of 1862, in this respect, prescribing the punishment for murder in the second degree, and purporting to provide for such an offence, is wholly inoperative. Applying then, the

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familiar rule of construction, that every statute should be so constructed, if it may be, as to give it some effect, I think we must hold that murder in the second degree embraces the class of cases above indicated, to wit, that class of cases excluded from the third subdivision of murder, as embraced in the Revised Statutes.

The language of this 5th section of the act of April 12, 1862, so far as it attempts to make a definition of murder in the second degree, is extremely ambiguous; but it is susceptible of being read to the effect above indicated, and I am of the opinion that such was the intent of the framers of this statute.

If I am right in the views above expressed, it follows that the conviction and judgment were right, and should be affirmed.

BACON, J. (dissenting).—This is a writ of error, directed to the Supreme Court in the Second Judicial District, bringing up the record of an indictment, conviction, and sentence of the Plaintiff in Error, and which had been removed into that Court by writ of error to the Court of Oyer and Terminer, in and for the county of Westchester.

The Plaintiff in Error, Fitzgerrold, was indicted in the Westchester Oyer and Terminer, for the alleged crime of murder.

The substantive allegation in the indictment, on which the question was presented below, and in this Court arises, is, that "Thomas Fitzgerrold, feloniously, wilfully, and of his malice aforethought, did kill and murder Ellen Hicks, by shooting her through the body with a leaden bullet, discharged from a musket," &c.

Upon this indictment he was brought to trial before the Westchester Oyer and Terminer,, in December, 1866, and the record states that the jury, in returning their verdict, "say that they find the said Thomas Fitzgerrold guilty." Upon this conviction he was sentenced to be hung the ensuing January.

The Supreme Court in the Second District affirmed the judgment, ordered the sentence to be carried into execution, and a writ of error having been brought to this Court, with a

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stay of execution, the case comes here for final adjudication.

The point made by the counsel for the Plaintiff in Error is, that the indictment only charges murder in the second degree, and the jury having returned a general verdict of guilty, the Court of Oyer and Terminer had power only to pronounce a sentence authorized by law in the case of a conviction for murder in the second degree, and that the sentence actually pronounced was unauthorized and void. The question is one of much interest and importance, and has never been presented for adjudication since the change made by the statute of 1862, defining murder in a somewhat different manner from that contained in the Revised Statutes, and creating two classes or degrees of that crime. At common law there were no degrees of murder, and the short and comprehensive definition of the crime was, "when a person of sound memory and discrimination unlawfully killeth any reasonable creature in being, and under the King's peace, with malice aforethought, express or implied" (3 Coke's Jus. 47).

The essential ingredient of the crime was malice aforethought, or prepense, as the old books called it, but this might be implied from circumstances, which necessarily proved its existence.

The Revised Statutes undertook to give a more precise as well as a fuller definition of the crime, but they did not in reality enlarge the scope of the definition, nor include in it anything which had not been embraced by the common law within the general category of murder.

The Revised Statutes defined the killing of a human being (unless it be manslaughter, or excusable or justifiable homicide) to be murder in the following cases:

"1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being;

"2. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual;

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"3. When perpetrated without any design to effect death, by a person engaged in the commission of any felony."

This was the entire definition, and although distinguished by different characteristics, and attendant circumstances, the definition embraced but one offence, not separated into, nor discriminated by grades or degrees of crime.

After the Revised Statutes went into operation, the case of The People v. Enoch arose, and was decided in the Supreme Court, and ultimately in the Court of Errors, (13 Wend. 159). He was indicted for murder, and the averment was, that the offence was committed "feloniously, unlawfully, and of malice aforethought," using substantially the old common law form, and not adopting the words of the statutes. Enoch was convicted of murder, and sentenced to be executed.

The Supreme Court held that the indictment was good, and sustained the judgment, and the Court of Errors approved the decision, holding, among other things, that the principal object of the statute was to restore the common law of murder, as it anciently existed, by discriminating between a felonious killing with malice aforethought, and a felonious killing without such malice, and thus to restrict certain cases to the grade of manslaughter, which theretofore were held to be murder.

If there had been no change in the statute, I am inclined to the opinion that this decision (although, as I think, erroneous in principle, and hardly to be reconciled with some recent holdings of this Court) would control this case, and uphold the judgment. But in 1862 the Legislature saw fit to modify the provisions of the Revised Statutes, in relation to the crime of murder, and, among other things, to create two grades of the offence, to wit, murder in the first, and in the second degree.

In defining murder in the first degree they changed the definition of the Revised Statutes of murder by dropping the third subdivision of section 5, and substituting in place of it the words, "when perpetrated in committing the crime of arson in the first degree;" and then added to the section a clause that "such killing, unless it be murder in the first degree, or

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manslaughter, or excusable or justifiable homicide, or when perpetrated without any design to effect death by a person engaged in the commission of any felony, shall be murder in the second degree."

It will thus be seen that the transaction thus distinguished, and which had been embraced in the original section defining murder, was taken out of that section, and made the distinguishing mark of murder in the second degree; and whatever practical difficulty may arise, as it has not unfrequently arisen, in ascertaining what other taking of life may fall outside of the definition of other grades of homicide, and within this new class or degree, there is no difficulty in determining that a case which presents these features, to wit, a killing by one engaged in the commission of a felony, though without a predetermined intent to take life, is murder in the second degree.

While the crime of murder was a single offence, admitting of no degrees, the case of The People *v.* Enoch might be deemed a controlling authority; but the moment the Legislature changed the law of murder, by creating a higher and lower grade, it seems to me to have lost its applicability, if, indeed, it be not, in spirit, an authority against the ruling of the Supreme Court in the case now under consideration.

The Chancellor, in maintaining the doctrine that an indictment in the old common law form, charging the crime to have been committed with malice aforethought, was sufficient under the Revised Statutes, says the object of the Legislature was not to create a new offence of murder, but to restore the ancient common law on that subject, as it existed when the common law form was originally adopted: and therefore holds that the indictment in that form was good for the crime of murder committed under any of the circumstances specified in those subdivisions defining the crime.

If this be so, then the indictment in the case was a perfectly just indictment for murder in the second degree, since the killing, which was murder under the circumstances described in the third subdivision of the 5th section of the Revised Stat-

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utes, is now removed from the category of murder in the first degree, and constitutes murder in the second degree.

The jury, therefore, having found a general verdict of guilty, under an indictment which may be held to charge the crime of murder in the second degree, the Court had no right to assume that he was guilty of murder in the first degree, and pass a sentence which only a conviction for such an offence would authorize.

The decision in the case of The People *v.* Enoch proceeded, in effect, as we have seen, upon the ground that the Revised Statutes, in respect to the crime of murder, had not altered the common law, and that the definition therein given was but the adoption or introduction into the statute of the common law description of the crime. It was consequently held, that the words "malice aforethought" were so nearly identical with the words "premeditated design," as to fall within them. But with all proper respect for that decision, which appears to have been the unanimous judgment of the Court of Errors, affirming the judgment of the Supreme Court, it seems to me that both Courts overlooked and ignored the most important qualification of the words "premeditated design," contained in the words following it in the statute, to wit, that the design thus premeditated must be one "to effect the death of the person killed, or of any human being." The ruling purpose must be one to effect death, whereas the words "malice aforethought" may be referred to a dominant and controlling purpose having another object, and the death effected occurs as an adventitious result of the original act to which the motive impelled. And this is obviously the case where death is caused by one engaged in the commission of a felony, without any original design to cause the death of any human being whatever.

This view is very clearly presented in the opinion of Johnson, J, in The People *v.* Clark (3 Seld. 385,393), where he says that "malice prepense had attained a broader meaning than belongs to the term premeditated design. *The intent to take life was not necessary to constitute malice prepense.* Even express malice, or malice in fact, is defined to be a deliberate

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intention of doing any bodily harm to another, unauthorized by law,and by no means necessarily involved an intent to take life. The change, therefore," he adds, "which the statute has effected, by substituting the word 'design' in place of 'malice' * * * was to require—what the common law did not require —the existence of an actual intention to kill, to constitute that crime under the first subdivision of the 5th section;" and this view is said to be sustained "in those States where the crime of murder has been distinguished by statute into murder in the first and second degrees."

The logical sequence from these propositions would seem to be, that even under the Revised Statutes the proper mode of framing an indictment for murder would be, to follow the very words of the statute, and thus to indicate, by specific averments, under which one of those subdivisions of the 5th section defining the offence, the alleged crime was committed.

But, however that may have been, under the law as it now stands, creating degrees of the crime of murder, the obligation seems to me imperative, to pursue the mode thus indicated; and my opinion is, that an indictment for murder must show, by proper averments on its face, that it is for murder in the first degree, if that is the offence intended to be presented for trial; and that where the record shows nothing but an indictment, which is a good indictment for murder in the second degree, and the jury responds by a simple verdict of guilty, the only sentence that it is competent for the Court to pronounce is the one prescribed by the statute for murder in the second degree. In the case of Dedieu v. The People (22 N. Y. 178), this Court enunciated the principle which, it seems to me, should govern this case. In the course of the opinion, Judge Denio, speaking of a statute specifying different degrees of crime, says: "An indictment for any of these offences must charge the Defendant, with certainty and precision, with having committed the acts under the circumstances and with the intent mentioned in the statute. If any of the ingredients contained in the statute definition are omitted, the indictment is fatally defective, and the defect is not cured by verdict. * * * The

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act which is charged as an offence must be described with such a degree of certainty as to distinguish it from other transactions, so that the party may not be indicted for one thing and tried for another." See also the opinion of Ingraham, J., in Fellinger *v.* The People (15 Abb. 128). This mode of charging alleged crime in an indictment seems to me not only just but elementary, and should be governed by the same rule that applies to a pleading in a civil action, by a party who claims a penalty, or seeks to enforce a remedy given him by statute, and who must bring his case precisely and specifically within the provisions of the statute, or his pleadings will be fatally defective.

It is no answer to say, that on the trial in this case all the proof necessary was given to show that the Defendant was guilty of the crime of murder in the first degree, and that we may assume that the Court instructed the jury properly as to the character of the prisoner's guilt, and therefore no injustice has been done.

This we cannot know, for this case comes before us without any evidence whatever, but simply upon the record showing under what indictment the trial took place, and what verdict was rendered—a verdict entirely consistent with an indictment and a trial for murder in the second degree; and if any other verdict had been rendered it would, in my judgment, have been erroneous.

If these views prevail, the judgment of the Supreme Court must be reversed; and the question then arises, what disposition shall now be made of the case? We cannot send back the prisoner for a new trial, since, if there were no other difficulty, the constitutional immunity of the Plaintiff in Error, which forbids his being twice put in jeopardy of life for the same offence, would protect him from the perils of another trial.

But I see no objections to remitting the case to the Court below, for further action. Our reversal, in fact, touches nothing but the sentence.

Upon an indictment good for the offence of which I assume the prisoner was found guilty, a proper verdict has been ren-

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dered. Everything is right but the sentence; and as that will be greatly mitigated by the position in which the case now stands, the record should be remitted to the Supreme Court, with directions to cause the Plaintiff in Error to be brought before it, to receive the sentence which the statute authorizes the Court to pronounce, upon a conviction for the crime of murder in the second degree.

Affirmed.

JOEL TIFFANY,
State Reporter.

THE PEOPLE EX REL. THOMAS REILLY, RESPONDENTS, *v.* FREDERICK JOHNSON AND OTHERS, APPELLANTS.

Evidence—Summary Proceedings—Tenancy—Judgment Record in another Suit.

Upon the question of the tenancy of the Defendant in a summary action to dispossess him, it is incompetent to introduce a judgment record in which the question of tenancy was not in issue, but was merely incidental or collateral, and was not necessarily decided by the judgment.

ON the 28th day of February, 1861, the Appellants presented to C. W. Van Voorhis, the Justice of the Seventh District Court of the city of New York, the affidavit of Frederick Johnson, one of the Appellants, and thereupon demanded pro-

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Judgment—Conclusiveness—As to immaterial facts. 44 *N. Y.* 14; 116 *N. Y.* 509 (27 *St. Rep.* 555); 123 *N. Y.* 529 (34 *St. Rep.* 413); 129 *N. Y.* 123 (41 *St. Rep.* 499); 137 *N. Y.* 268 (50 *St. Rep.* 791); 163 *N. Y.* 178; *D.* 170 *N. Y.* 292; 171 *N. Y.* 128; 172 *N. Y.* 342; 185 *N. Y.* 126; 4 *Hun,* 150 (6 *T. & C.* 532); 22 *Hun,* 326; 18 *App. Div.* 6 (45 *N. Y. Supp.* 483; 26 *Civ. Proc.* 389); *D.* 49 *App. Div.* 326 (63 *N. Y. Supp.* 903); 2 *Abb. N. C.* 185; 11 *Abb. N. S.* 57; 10 *Misc.* 350 (63 *St. Rep.* 413; 31 *N. Y. Supp.* 63, 24 *Civ. Proc.* 171); 3 *Civ. Proc.* 320; 48 *Super. Ct.* 421; 15 *Daly,* 77 (19 *St. Rep.* 798; 2 *N. Y. Supp.* 73); 16 *Daly,* 278 (32 *St. Rep.* 63; 10 *N. Y. Supp.* 530).

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cess to remove the Relator, Thomas Reilly, from the premises known as Hermitage Hall, in the city of New York, upon the ground that said Reilly was a tenant of the said Appellants, and was holding over after the expiration of his term, without the leave of his landlords.

On the 1st day of March, 1861, the Justice issued a summons against Reilly, requiring him to remove from said premises, or to show cause to the contrary on the same day.

On the return of such summons, Reilly interposed a counter-affidavit, and demanded a jury trial.

The cause came on for trial on the 8th day of March, 1861, and was tried on that day, and the result was a verdict in favor of the landlords, upon which a warrant was issued, and Reilly was dispossessed, and Johnson and McMann were put in possession of Hermitage Hall.

From the judgment entered upon this verdict, a certiorari was issued out of the Supreme Court, and the judgment of the District Court was there reversed, and restitution ordered; and from such judgment of the Supreme Court an appeal is taken to this Court.

L. B. Pert for Appellants.
E. W. Dodge for Respondents.

BACON, J.—There is but a single question in this case, and that arises upon a ruling made by the magistrate before whom the proceeding was taken to oust the Relator from the premises of which, it was alleged, he was a tenant. In the affiadvit which was the foundation of the proceedings before Van Voorhis, the Appellant Johnson had sworn that Reilly, the Relator, was the tenant of Johnson and Cornell (who claimed to have been the owners in fee of the premises) in March, 1859, for six months from that date; and on the 22d of September, 1859, they had let the premises to him for a further term of three months, which expired in December, 1859, and that he was holding over without the permission of Johnson and McMann (to whom Cornell had conveyed his interest) after the expiration of his term.

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On the trial the only evidence given by the Appellants, to maintain their allegation, was a judgment record in an action in the Superior Court, in which Reilly, the Relator, was Plaintiff, and Johnson, Cornell, and McMann were Defendants, and the record is set forth in full in the case. To the competency of this record to prove the issue, the counsel for Reilly duly objected, and the objection was overruled, to which an exception was taken, and the record was read in evidence, and the case was rested on the part of the landlords. After evidence had been introduced on the part of Reilly, the case was given to the jury, under a charge in which the magistrate told them, among other things, that if the jury believed that one of the issues tried and determined in the suit in the Superior Court was the question of landlord and tenant between the parties, then the parties to such suit were bound by the judgment, which was final and conclusive; and that it was a question of fact for the jury, taking all the evidence into consideration, the judgment record, and the Defendants' testimony.

In this ruling, I think, the Court below committed a manifest error. By looking at the pleadings in the suit in the Superior Court, it is obvious that the only real question in issue between the parties was, whether the deed held by Johnson and Cornell, of the premises in question, known as Hermitage Hall, was not in fact only a mortgage, as security for the repayment of the sum of $5,600, advanced by them to one Shea, upon the conveyance to them. This was the whole object and gravamen of the complaint in which that state of facts was alleged; and the claim of the Plaintiff was, that it should be adjudged a mortgage, and the Defendants in the suit be required to convey their interest in the premises to him, on being paid the sum for which they were held as security. In the answer all these allegations were specifically controverted, and the agreements and negotiations of the parties respecting the premises professed to be set forth, and, among other things, it was alleged that there was a tenancy of the premises for a limited period, by Reilly. But it is evident that this was a mere incidental or collateral issue, the main and vital controversy between the

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parties being the allegation of an equitable mortgage on the one side, and the right to redeem on the other; and deciding that question for or against the Plaintiff was deciding the whole issue. As, then, the issue in that suit did not necessarily involve the question whether Reilly was or was not the tenant of Cornell and Johnson, and was not essential to its determination, the record in that case was not, and could not be evidence of the fact; and yet this was all the evidence there was in the case before the magistrate. It is a very familiar principle that a judgment concludes the parties only as to the grounds covered by it, and the facts necessary to uphold it (Cow. & Hill's Notes, vol. 3, p. 826); and although a decree in express terms professes to affirm a particular fact, yet if such fact was immaterial, and the controversy did not turn upon it, the decree wil not conclude the parties in reference to that fact (Coit *v.* Tracy, 8 Conn. 268; Manny *v.* Harris, 2 John. 24). The mere fact of the alleged tenancy is undoubtedly found by the Judge on the trial in the Superior Court; but the fact was immaterial, and the judgment did not in any respect rest upon that finding, as is most obvious from an inspection of the pleadings, the findings of the Court, and the final judgment rendered thereon. The Court below consequently erred in overruling the objection of the counsel of the Relator, and allowing the record to be put in evidence for the purpose of establishing the relation of landlord and tenant between the parties.

There is nothing in the case from which to find any tenancy but the record in the Superior Court, and the jury must have determined it from the record, which, having been improperly received in evidence, there remained nothing in the case to uphold the verdict, which was properly reversed on the certiorari to the Supreme Court.

The judgment being thus reversed, it was almost a matter of course to award restitution of the premises to the party improperly dispossessed. If this is not made mandatory by the statute, but permissive, and depends on the exercise of discretion in the Court, that discretion was exercised, if not in the first instance by the Court, ultimately, at General Term, refus-

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ing, on a special motion, at the instance of the Appellants, to set aside the order which had been settled and entered as the order of the General Term, and confirming the judgment by which restitution was directed to be made to the Relator. Chamberlain v. Choles (35 N. Y. 477) is a precise authority to show that where a party has been dispossessed by a suit improperly granted, he is entitled to restitution. The judgment should, in my opinion, be in all things affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

CHARLES H. WINFIELD v. SAMUEL B. POTTER.

Dismissal of Complaint—Pendency of another Suit for same Cause of Action.

When there is no evidence furnished under the answer setting up a defence, that a suit is already pending for the same cause of action, the Court cannot presume the answer to be true.

MASON, J.—The only point presented by the Appellant in this case, is the one raised upon the trial, on his motion to dismiss the complaint, upon the ground that he had sustained the sixth defence set up in his answer, which was, in short, the pendency of a prior suit for the same cause of action, in the name of John B. Ireland, receiver, which suit, it was claimed, was prosecuted for the benefit of the Plaintiff in this suit. The Court properly overruled this motion. There is no evidence in the case to show that the suit by the receiver (Ireland) was commenced first; and besides, the Defendant utterly failed to show that the suit brought by Ireland was for the same cause of action embraced in the complaint in the present suit. The present suit is on an action at law to recover of the Defendant $1,125, upon an express contract by the Defendant to pay the same to H. B. Hart, who assigned the same to F. B. Betts, and

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who assigned the same to the Plaintiff in this action, in which suit the Plaintiff declares upon the contract, setting forth the assignments from Hart to Betts, and from Betts to him. The suit by Ireland, receiver, is a creditor's suit strictly, brought by Ireland, as receiver, to enforce the collection of a judgment in this Court, in favor of the present Plaintiff against Betts and Thompson. The complaint sets forth the recovery of the judgment against Betts and Thompson, the issuing of an execution thereon to the Sheriff, and the return of nulla bona by the Sheriff. The Defendant in this suit, and both Betts and Thompson, were made Defendants, and the object of the suit was to set aside a bill of sale of certain property made by Thompson, of the firm property, to the Defendant Potter, as fraudulent as against the creditors of Betts and Thompson, or else to reform such bill of sale, so as to make Potter liable for the debts of Betts and Thompson, and that Potter be decreed to insert a covenant in that bill of sale, obligating himself to pay the debts of the said Betts and Thompson.

The two suits are not near enough alike to claim relationship, and I am satisfied that the keenest judicial perception will never be able to discover their identity. The suit in the action at law by the Plaintiff against Betts and Thompson *was,* I am satisfied, upon the same note which was the foundation of the action in the present suit—or rather, was the same note which the Plaintiff, in the present suit alleges that Potter agreed to pay. But the creditor's suit against the Defendant and Betts and Thompson was to reach the assts of Betts and Thompson in the hands of the Defendant, or to obtain the judgment of this Court that he be decreed to pay the Plaintiff's judgment, &c. It is possible that in such creditor's suit the receiver may include this demand among other, and it also possible that the Plaintiff has collected his debt in that suit, but there is nothing here to show it except the affidavit made by Mr. Chester, to obtain relief against this judgment.

This Court, as an appellate tribunal, cannot grant to the Defendant the relief which he asks. He must make his motion

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in the Supreme Court, which Court has full power over the judgment, and will not, I presume, allow the same demand to be collected twice. The Appellant's counsel has informed us, in his brief, that he deems it safe to rest the case on this one point, without going into the case or arguing any other exception; and I will only say, in regard to the other exceptions, that I have carefuly examined the various rulings of the Court below upon the questions of evidence, and find no errors committed calling for the reversal of the judgment on that ground.

The charge of the Judge to the jury submitted fairly every proposition in the case to the jury, and none of the exceptions thereto were well taken; and I advise the affirmance of the judgment.

CLERKE, J.—This action is brought on an agreement, by which the Defendant promised to pay H. B. Hart one thousand one hundred and twenty-five dollars whenever he should receive certificates under a contract between Frederick F. Betts & Co. and the government of the United States, for the making and delivery of five thousand sets of military equipments, provided he should receive certificates to that amount. The Defendant became the assignee of this contract with the government of the United States, by sale from Betts & Co., their assets including the equipments, for the sum of $8,000, which they had previously owed him. The consideration of this agreement was that Hart should aid Potter in procuring the inspection and acceptance by the government of these military equipments. It also appeared that Frederick F. Betts & Co. owed this sum of $1,125 to Hart, at the time of the sale of their assets to the Defendant. Hart assigned the agreement with the Defendant to the Plaintiff in this action. The answer denies the assignment by Hart to the Plaintiff; sets up that the Plaintiff is an attorney-at-law, with the intent and for the purpose of bringing a suit thereon, contrary to the statute; that Hart, at the same time when Defendant signed the agreement above mentioned, signed an agreement in which he prom-

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ises to aid Potter in getting the goods examined by the government, "without charge."

The answer also sets up fraudulent representations on the part of Hart to induce the Defendant to sign the agreement; that Hart never aided him in procuring the certificates, and, in fact, that he never received from the government any of the certificates mentioned in the agreement. For a sixth defence he sets up the pendency of another action.

The Defendant's counsel moved to dismiss the complaint, on the ground that another action for the same cause was then pending. There was nothing to show that the other action was for the same cause, except that it was for a similar amount; but it was between parties other than the parties to this suit. The Judge, in his charge to the jury, instructed them that the fact set up, that the Plaintiff in this action is an attorney-at-law, practising in New Jersey, is no defence. There was no evidence pending showing that the Plaintiff purchased the agreement with the intent and for the purpose of brining a suit thereon. All the other questions of fact were fairly and precisely left to the jury.

The exceptions are clearly untenable. The judgment should be affirmed, with costs, and ten per cent. damages.

Affirmed.

JOEL TIFFANY,
State Reporter.

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JOSEPH COLWELL, RESPONDENT, v. HERBERT LAWRENCE, JR., ET AL., APPELLANTS.

Contract--Parol Evidence--Findings of Fact—Liquidated Damages.

It is not competent to explain, vary or alter the effect of a written agreement by parol evidence. Nor is it competent wih such a view, to inquire into prior or contemporaneous negotiations of the parties.

If the referee does not find sufficiently the facts claimed to be in issue, it is the duty of counsel at the time to require it, and, if necessary, seek the aid of the Court below to compel it. But failing to do so, the Appellate Court can given no aid where it is claimed the findings are not sufficiently full.

A forfeiture of $100 per day for not completing steam engines held a penalty and not liquidated damages.

THIS was an action brought by the assignee of an insolvent firm to recover money for work done by the assignors for the Defendants, under a contract to build and complete two steam engines, on a boat of the Defendants, and extras connected therewith, and for other work done of the same character, for which the Plaintiff claimed a balance of $3,347.37. The Defendants set up a counterclaim of various item. The case was referred, and the referee reported in favor of the Plaintiff for $1,255.40, for which amount judgment was entered.

The facts, so far as material, and the exceptions taken, are

Contracts—Construction—Intent—Forfeiture. 60 *N. Y.* 412; 69 *N. Y.* 58; 85 *N. Y.* 266; 122 *N. Y.* 401 (33 *St. Rep.* 725); 160 *N. Y.* 556; 161 *N. Y.* 51; 28 *Hun,* 145; 11 *App. Div.* 380 (42 *N. Y. Supp.* 95); 16 *Abb. N. S.* 405; 22 *Misc.* 673 (49 *N. Y. Supp.* 944) 48 *St. Rep.* 923 (20 *N. Y. Supp.* 548).

Evidence—Parol—To vary writing. 36 *Hun,* 442; 10 *Misc.* 458 (64 *St. Rep.* 34; 31 *N. Y. Supp.* 457); 34 *St. Rep.* 567 (12 *N. Y. Supp.* 236).

Contracts—Penalty—Liquidated damages. 5 *Hun,* 459; 82 *App. Div.* 430 (81 *N. Y. Supp.* 878); 92 *App. Div.* 342 (86 *N. Y. Supp.* 1069); 3 *Daly,* 472; 1 *City Ct.* 133.

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noticed in the opinion. The Defendants appealed to the General Term of the Supreme Court, in the First District, and the judgment was affirmed, and an appeal was taken to this Court.

James Clark for Appellants.
D. McMahon for Respondent.

MILLER, J.—It is insisted that the referee erred in not awarding damages to the Defendants by way of recoupment, or set-off to the Plaintiff's demand, for the negligent and unskilful construction of the engines built, and in failing to make a decision upon the issue joined in reference to said damages.

The referee has made no special finding as to this claim, nor was there any request to make any such finding; but he has allowed an off-set of $781.68 to the Defendants. It does not appear of what items this amount is composed, nor is it very material, in my opinion, as the evidence as to the amount of the Defendants' set-off, including this claim for damages, was conflicting, and presented questions of fact for the consideration of the referee, which he has disposed of in his decision, and with which we are not at liberty to interfere. Questions of fact, on affirmance below, are not properly before this Court, and the Appellants, under the adjudications heretofore made, cannot urge that the report of the referee was erroneous as to the facts (Metcalf *v.* Mattisons, 32 N. Y. 464; Doty *v.* Carolus, 31 N. Y. 547; Wilcox *v.* Hawley, 31 N. Y. 648; Petersen *v.* Rawson, 34 N. Y. 370).

No exception was taken to the ruling of the referee, admitting the question put to one of the witnesses, whether the specification called for connecting the engines by a centre shaft. I think, however, that the question was a proper one. The witness was an expert, and the subject of inquiry was in regard to a matter which was not familiar to the Court. He looked at the diagram of the engine, the contract and specifications, and gave an opinion to explain technical terms in the contract, and the meaning of provisions contained in the specifications

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which were properly susceptible of explanation in this manner. Such evidence, I think, was clearly admissible (Smith *v.* Gugerty, 4 Barb. 614; the R. & S. R. R. Co. *v.* Budlong, 10 How. 289; Curtis *v.* Gano, 26 N. Y. 426).

I also think that the referee properly excluded evidence of what occurred between the parties prior to and at the time of making the contract. The rule is well settled, that all conversations had prior to the execution of a written instrument, become merged in the instrument, when executed. There was nothing in the offer to show that the testimony was intended to explain what was otherwise obscure, or unintelligible, and that such explanation was not inconsistent with the written contract (1 Gr. Ev. § 282), nor that the facts and circumstances under which the contract was made would give any light in the interpretation of the instrument (1 Gr. Ev. § 287). Neither was it offered to explain a latent ambiguity (id. 297). If the evidence was in any respect admissible, and the referee erred in excluding it, I am inclined to think that the difficulty was obviated by the withdrawal afterwards, on the part of the Plaintiff, of all objections to testimony of a similar character which was offered by the Defendants.

It is further insisted by the Defendant's counsel, that the stipulation in the contract, to the effect that the engines were to be completed and ready on or before the fifteenth day of October, 1857, under a forfeiture of one hundred dollars a day after the above day, until they were completed, which was on the fourteenth day of February afterwards, provided for liquidated damages, and the referee erred in not allowing those damages, at the rate of one hundred dollars a day. A point is taken by the Plaintiff's counsel, that the Appellants are not in condition to raise this question of damages on this appeal, because. as a question of fact, the affirmance of the referee's report by the General Term is conclusive; and as a question of law, no request was made to the referee to rule on this point or to find as a matter of law; and no specific exception was taken to the findings of the referee for disallowing this item.

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Without discussing the validity of these objections, I am of the opinion that this was not a case for the allowance of the forfeiture named in the contract as liquidated damages.

The question whether such damages as are stipulated in the gross amount fixed for a failure to perform a contract is in the nature of a penalty, is one of considerable difficulty, and the authorities upon the subject are replete with contradictions. It is not necessary to review the various cases where the question is discussed, and it is enough to refer briefly to some of the principles by which cases of this character are to be determined. One of the rules of construction established is, that the Courts are to be governed by the intention of the parties, to be gathered from the language of the contract itself, and from the nature and circumstances of the case (Cotheal *v.* Talmage, 5 Seld. 554; Crisdee *v.* Bolton, 3 Car. and P. 240); and in all the cases, the Courts have treated it as a question as to the intention of the parties (Reynolds *v.* Bridge, 37 Eng. L. &. Eq. 130). Having in view this rule, it is scarcely to be supposed that the parties intended to fix an amount so extravagant, and which would be, if allowed as claimed, so grossly disproportionate to the damages, as liquidated damages for so trival an ommission or delay, and I cannot discover any sufficient and satisfactory reason for any such inference or conclusion. Nor in any such intention to be presumed upon the hypothesis that the damage resulting from a breach of this contract would be of such an uncertain amount as to be incapable of proof, and that it would be difficult to show the nature of the injury caused, and the actual damages arising from the delay.

It may also be observed that the language of the contract itself militates against any such theory. Not a singleword is said about liquidated damages, and the word "forfeiture," which is equivalent to a penalty, is used, with manifests that a penalty was intended. Nor should it be overlooked that many of the cases decided sustain the doctrine, that, even where the term liquidated damages is incorporated in the instrument, the gross

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amount fixed is in the nature of a penalty (1 Hoag *v.* McGinnis, 22 Wend. 165; Spear *v.* Smith, 1 Denio, 464; Bagley *v.* Peddie, 16 N. Y. 469; Lampman *v.* Cochran, 16 id. 275; Staples *v.* Parker, 41 Barb. 648).

Another view may also be invoked, and, I think, is applicable to the present case, and that is, that there is sometimes plausible ground for withholding the doctrine of liquidated damages, when the party might be responsible for the whole amount of damages for the breach of an unimportant part of a contract, and so be made to pay a sum by way of damages grossly disproportionate to the injury sustained (5 Seld. 557, before cited; Clement *v.* Cash, 12 N. Y. 253). Looking, then, at this provision of the contract as it stands, with all the difficulties in the way of its construction with which the numerous authorities on the subject invest it, and considering the severe consequences which would accrue from a strict and rigid enforcement of its conditions, and with very much to show a different intention, I am constrained to hold that there is not such a clear expression of the intent of the parties as would warrant the conclusion that the amount named was designed as liquidated damages.

The views I have expressed dispose of all the questions presented, and the judgment of the General Term must be affirmed.

WOODRUFF, J.—The only exception which appears to have been taken by the Appellants to the ruling of the referee in receiving or rejecting evidence, was to his sustaining the Plaintiff's objections to proof of the oral negotiations and conversations between the parties prior to and at the time of the making of the contract in suit.

The rule is too familiar to be questioned, that it is not competent to alter, vary, or affect the obligations created by a written agreement by evidence of the contemporaneous or prior ngotiations of the parties. The questions which were objected to called for all that took place. In every possible view of the

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subject such a question was properly excluded. If it had been proposed to show a distinct collateral agreement not embraced in the terms of the contract, a different question would arise; but there was no such claim or pretence. If the terms of the agreement were ambiguous in their application to the subject-matter, it might be competent to show what was before the minds of the parties,: but no such ambiguity existed. The terms of the written agreement prescribed certain particulars; and in respect to what was not specified, the engines agreed to be built were to be unsurpassed by any steamboat engines of their class, and guaranteed to propel a boat of dimensions stated, at a speed mentioned. It is clear that, except in the particulars stated, the details of the construction were left to the judgment of the builders, and no evidence of parol agreements inconsistent with this was admissible. But there is in truth no foundation whatever for the exception. The Plaintiff's counsel withdrew his objections, and the witness testified, at great length, to his interviews with the Plaintiff, and what took place between them, from the moment when the proposition to build was first made, down to the time when the steamboat went to Havana.

The other exceptions are chiefly addressed to the findings of fact, which are not the subject of review in this Court, in the form presented by the present case. Had the Supreme Court deemed it their duty to reverse the judgment upon questions of fact, and so stated in the order of reversal, the present law gives this Court jurisdiction to review such questions.

The Appellants' counsel, in his argument, has taken a much wider range, and asks us to reverse because the referee has *not found* or passed upon various matters which, he claims, were in issue. If he desired a more full or specified finding he should have required it, and, if necessary, have sought the aid of the Court below to that end.

It is not within the jurisdiction of this Court to examine the case except upon the facts found, and if there was no error in law committed, assuming the facts to be as found by the referee, we

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have no other alternative but to affirm the judgment. Whether, upon a request to find upon issues or questions deemed material, and a refusal by the referee to find either way, an exception will lie which would be available in this Court, was left undecided in Grant *v.* Morse (22 N. Y. 323), and the question does not arise here, for the case does not show that the Appellant desired, or has in any manner sought or requested, any other or further findings than are contained in the report of the referee.

Upon the facts found, the conclusions of law stated by the referee are inevitable, unless, as matter of law, it be true that it appears by such findings that the Defendants were entitled to be allowed $100 per day, as liquidated damages for the contractor's delay in completing the engines contracted for, so far as necessary to extinguish all claims by the Plaintiff's assignors. The contract bore date May 28th, 1857, and in terms required the Plaintiff's assignors to build and place on board a steamboat, to be furnished by the Defendants, two steam-engines of the description specified, for the price of $8,000, "and to have the same completed, ready for steam, on or before the 15th October next, under a forfeiture of one hundred dollars per day for each and every day after the above date, until the same is completed as above."

The referee has found that the work so agreed to be done was not completed until about the middle of February, 1858—120 days after the day mentioned for its completion. It does not appear by any distinct specification in the referee's report whether he allowed anything to the Defendants for damages by reason of the delay, or whether any damages were proved by them to have been sustained. The proper inference is, that if any were proved they were allowed.

But it is quite clear that one hundred dollars per day, or $12,000, were not allowed, else it would have extinguished all claims by the Plaintiff.

I think that in this there is no error.

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First. The contract declares this provision to be a *"forfeiture."*

It must then be so construed, and the parties be deemed to have so intended, unless the agreement plainly indicates the contrary. The general rule requires that what the parties themselves prescribed as a forfeiture shall be so treated.

The agreement in this case does not clearly indicate the contrary. The engines were to be built and put up complete to the satisfaction of the Defendants, or other competent judges. The forfeit, or penalty as such, was appropriate to compel the Plaintiff to supply or remedy the slightest deficiency, but by no means indicated that a slight defect, easily and at small expense supplied, was to be compensated, and no more than compensated, at one hundred dollars per day.

Second. The report of the referee shows that the parties themselves either treated this provision of the contract as not providing a sum certain as liquidated damages, or, for reasons satisfactory to themselves, waived performance according to the letter of the contract.

On the 27th December—seventy-two days after the expiration of the term limited by the contract for the completion of the work—they adjusted the amount due to the assignors of the Plaintiff at $9,676.34,—recognizing the right of the contractors, notwithstanding the delay, to the full contract price, and to payment for extra work beyond that price. This plainly indicated either that the sum mentioned as a forfeiture was a mere penalty, and the delay was without actual damage to the Defendants, or that such penalty or forfeiture had been waived by reason of alteration or extra work.

Third. If the question whether the one hundred dollars per day was intended by the parties as liquidated damages, or a penalty, depended upon facts extrinsic the contract itself—as upon the relation of the Defendants to the subject; their possible engagements to other parties; the value of the use of the completed engines, or other circumstances known to the parties when the contract was made; and in view of which the agree-

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ment was entered into—these were subjects of proof on the trial; and the finding of the referee, so far as it could properly be affected by such circumstances, must be regarded as a finding of facts, and conclusive. It is a matter of some satisfaction to me (though not within our province to investigate, because a mere question of fact), that the Defendants appear by the evidence to have collected from the party by whom they were employed to build the steamboat, the whole bill, and even more than has been awarded to the Plaintiff in this action.

The judgment should be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

ROBERT M. WARD AND WALTER S. GOVE v. CHARLES KELSEY, DEFENDANT AND APPELLANT.

Lease—Covenant by Lessor to keep in repair.

Under a covenant by the lessor that he will do all necessary repairs within a reasonable time after notice to him by the lessee, he failing to do so, will be liable to the lessee for the expense incurred in making the repairs himself.

THIS was an action brought by the lessee of a warehouse building in Brooklyn, against the lessor, to recover the expense of caulking the floors of the building, to prevent leakage from one story to another, whereby the goods in store were exposed to injury. The lease contained the following clause: "And the said party of the first part hereto [the lessor] hereby agrees, that he will do all necessary repairs upon said premises and pier, within a reasonable time after notice to him by the said parties of the second part requiring him to do so." In September, 1859, the lessees gave notice that the floors leaked, and de-

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Lease—Covenant to repair. 58 *N. Y.* 636; 1 *City Ct.* 80, 465; 100 *App. Div.* 495 (91 *N. Y. Supp.* 687).

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sired them to be repaired, and made tight, and again in October of the same year. The lessor neglecting to do it, the lessees themselves caused the repairs to be made, and brought this action to recover the expenses thereof. It was testified that the floor was tight when the lessees took possession of the building. It was testified that after a few months' occupying the same became open, and the lessor caused the same to be repaired and tightened; whether he did it upon the claim of right by his lessees, or upon an appeal to his generosity, was a point upon which the parties differed in their testimony.

The Judge charged the jury that if the floors, as originally constructed, were reasonably sufficient to answer the purpose specified, the Defendant was not bound to improve the floors by caulking or other means, but was only bound to keep them in as good condition as when constructed; that he was not bound to keep them in the condition of first-class warehouses. He further charged that if the floors were tight, as originally constructed, and from shrinking or other cause without the Plaintiffs' fault became leaky, it was the duty of the Defendant, upon proper notice, to return them to their former state of tightness, provided the business for which the stores were let reasonably required the floors to be tight. The jury found for the Plaintiffs, and the General Term of the Second District affirmed the judgment entered upon the verdict.

The Defendant now appeals to this Court.

W. Britton for the Appellant.

HUNT, CH.J.—According to the decision of Myers *v.* Burns (35 N. Y. R. 269), the covenant in question required the Defendant not only to keep the premises in good repair, but to put them in that condition. It might well have been submitted to the jury whether, in a warehouse of the size, condition, and locality of the one in question, water-tight floors were not indispensable, and whether it was not therefore the duty of the Defendant so to complete his building.

The Judge did not, however, go the length of either of these

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propositions. He simply charged that it was the duty of the Defendant to keep the floors tight, if they were so when originally constructed, and if the business of the Plaintiffs required it.

This was a construction of the contract to repair, quite favorable to the Defendant, and to which he took no exception on the trial. He can therefore make none now.

The Appellant insists, in his first point, that the Defendant was not bound to caulk the floors, thereby making them water-tight, which they before were not.

I understand the Judge's charge to be in accordance with this theory. He charged that the Defendant was not bound to keep the stores in the condition of first-class warehouses, and that he was not bound to improve the floors by caulking them, but was only bound to keep them in as good condition as when constructed.

The case went to the jury upon this theory, and they doubtless found that the Defendant had failed to keep the buildings up to their original condition.

Judgment should be affirmed, with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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CHARLES KELSEY v. ROBERT M. WARD ET AL.

Res adjudicata—Evidence.

A judgment of a Court of competent jurisdiction is final and conclusive upon the parties thereto, in respect to all matters then litigated, or which should then have been litigated and settled.

GROVER, J.—All the questions of law and fact, except that arising upon the offer in evidence, by the Defendants' counsel, of the pleadings, trial, and verdict in an action brought by these Defendants against the present Plaintiff, were involved and determined in favor of the Plaintiff in an action brought by the present Plaintiff against these Defendants for the recovery of a previous quarter's rent, for the same premises, as appears by the judgment record in the latter action, and introduced in evidence upon the trial of the present action. That record was regularly proved and properly admitted in evidence. It is true that there is incorporated in the record much that was unnecessary, but it contains all essential to its validity.

This judgment is conclusive upon all the questions determined thereby, which, as above remarked, embraces all the questions in the case, except as above specified. The rule as to the effect of a judgment is correctly stated in the opinion of the

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Rent—Counterclaim—Breach of Covenant. 28 *App. Div.* 487 (51 *N. Y. Supp.* 125); 73 *App. Div.* 227 (76 *N. Y. Supp.* 804); 63 *How. Pr.* 389; 11 *Daly,* 131.

Repairs by landlord—Failure to make. 19 *Misc.* 312 (44 *N. Y. Supp.* 479).

Tenant—Right to possession. 45 *Hun,* 67 (9 *St. Rep.* 492; 27 *Week. Dig.* 33); 27 *Misc.* 557 (58 *N. Y. Supp.* 298); 42 *Super Ct.* 11.

Judgment—Conclusiveness. 42 *How. Pr.* 357; 46 *Super. Ct.* 302; 5 *Daly,* 483.

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Court in Embury *v.* Conner (3 Coms. 512), and will be found at page 522; the authorities therefor are there cited. By the former judgment the right of the Plaintiff to recover the rent quarterly, and its amount, is conclusively settled, and can no further be litigated between these parties and their privies while that judgment remains in force.

The pleadings and verdict in the action brought by the Defendants against the present Plaintiff, offered in evidence by the Defendants' counsel, was rightly rejected. This evidence would have shown merely that the Plaintiff had failed in some things fully to perform the contract upon which the suit was brought, and that the Defendants had sustained damages by such failure.

This failure of the Plaintiff would have based an action upon the contract by the Plaintiff, had the Defendants refused or neglected to take possession of the property agreed to be leased to them by the contract. But they did take possession, and have continued to occupy the property. Having done this they are bound to pay the rent, recouping therefrom such damages as they have sustained by the failure of the Plaintiff to perform his contract, or at their election bring an action against the present Plaintiff for the recovery of such damages. The evidence offered and rejected tended to show that the Defendants had pursued the latter course.

There was no offer in the present action to recover damages on that acount. The judgment appealed from must be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

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GEORGE LOWMAN, RESPONDENT, v. WILLIAM P. YATES, SURVIVING ADMINISTRATOR OF JOHN PARMENTER, DECEASED, APPELLANT.

Principal and Surety—Extension of Payment—Fraud.

An agreement with a principal extending the time of paying the debt, to be such as will discharge the surety, must be such an one as can be enforced; that is, such an one as will prevent the collection of the original demand.

But if such agreement postponing the payment of the original debt be without consideration, or be void by reason of fraud in procuring it, the surety for the original debt will not be thereby discharged.

APPEAL from General Term of Supreme Court, Sixth District.

The action was tried before the Hon. John M. Parker, Justice, and a jury, at the Chemung Circuit, in February, 1865, and was brought upon a bond made by Anson C. Ely, as principal and John Parmenter, deceased, as surety, dated June 13, 1854.

The condition was that Ely should, on or before July, 1, 1855, pay, take up, and deliver to Lowman, two mortgages executed by him, amounting to $10,000, with interest upon them January 1, 1854.

The defense interposed was that the Plaintiff, without Parmenter's consent, on the 8th day of July, 1859, took from Ely

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Principal and surety—Discharge—Extension. 70 *N. Y.* 551; 108 *N. Y.* 171 (13 *St. Rep.* 125; 27 *Week. Dig.* 542); 138 *N. Y.* 206 (52 *St. Rep.* 146); 158 *N. Y.* 319, 321; 63 *Hun,* 421 (44 *St. Rep.* 710; 18 *N. Y. Supp.* 865); 8 *App. Div.* 417 (75 *St. Rep.* 223; 40 *N. Y. Supp.* 835); 9 *App. Div.* 323 (41 *N. Y. Supp.* 333); 25 *App. Div.* 516 (49 *N. Y. Supp.* 957); 27 *App. Div.* 159 (50 *N. Y. Supp.* 420); 28 *App. Div.* 547 (51 *N. Y. Supp.* 228); 60 *How. Pr.* 16; 21 *Misc.* 761, 762 (48 *N. Y. Supp.* 151); 4 *St. Rep.* 515 (26 *Week. Dig.* 157); 47 *St. Rep.* 135 (19 *N. Y. Supp.* 68).

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four negotiable promissory notes, to be applied upon the bond, for the payment, in the aggregate, of $6,956.69 of principal, in three, three and one-half, four and five years after date, and endorsed the same upon the bond, and thereby extended the time of payment, and discharged the Defendant as such surety.

It appeared upon the trial that, when the Plaintiff took the notes endorsed upon the bond, Ely represented himself to be worth $75,000, which representation was believed by the Plaintiff, and which induced him to take the notes. Ely also represented, at the same time, that he had paid Plaintiff's account or over-draft, at the Elmira Bank—$1,958.45—which was a part of an endorsement of $2,926, made at the same time when the notes were endorsed, but he had not and never did pay it.

The evidence showed that Ely was not worth the sum of $75,000, but was insolvent, and he knew it. Ely never paid the mortgages, and what he did pay was endorsed upon the bond.

The Plaintiff first became acquainted with Ely's circumstances after his death, which took place in the spring of 1861. Letters of administration were issued to his widow on the 7th day of October, 1861, and this suit was brought on the 29th of October, 1861, against the administrators of Parmenter, who died on the 19th day of July, 1858.

The notes were tendered to the administratrix of Ely before the suit was commenced, and were produced and offered to the Defendant upon the trial.

One of the administrators of Parmenter having died, an order was entered that the action proceed against the survivor.

The Defendant interposed several objections to the introduction of evidence upon the trial, which, so far as material, are stated in the opinion.

The Judge, among other things, charged the jury that, if the Plaintiff took these notes to be applied as payment upon the bond, when paid, he did in fact extend the time of payment, so far as the notes were concerned; but in reference to the residue

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of the bond, it would not discharge the surety, but it would discharge his liability upon the bond to the amount of the notes; and the Defendant excepted to this part of said charge. He also charged: "This obligation, in order to discharge the surety, must be one that may be enforced against the principal, and if he was induced to enter into it by the fraud of the principal, he may take advantage of the fraud, and it would not operate to discharge so much as the notes represented.

"You have therefore to inquire whether those notes were imposed upon the Plaintiff by the fraud of Ely.

"Did Ely represent to Lowman that he was good for the amount of those notes—that he was worth $75,000, and was it then true that he was not good?

"You must find from the evidence that he knew he was not good."

He also charged: "If you find that the notes were not imposed upon Lowman through any fraud on Ely's part, then, to the amount of these notes, the bond has been paid, as against the Defendants.

"It operates to discharge Parmenter from so much of the indebtedness, in consequence of the effect of the notes to extend the payment upon the bond.

"The bond was due when the notes were given; the notes had the effect to extend the bond three, four, and five years. The balance only could have been collected at that time. If, however, these notes were imposed upon the Plaintiff by such fraud as I have explained to you, they do not operate to discharge the Defendant upon the bond, and the Plaintiff is entitled to recover the amount which has not been paid upon the bond, deducting the undisputed payments, amounting, if Plaintiff's over-drafts on the bank were not paid by Ely, to $15,662.28, as sworn to by King.

"In order that the Plaintiff may avail himself of the fraud of Ely, it is further necessary for you to find that he returned the notes, or offered to return them promptly on ascertaining that Ely had defrauded him. I further charge and submit to

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you, as necessary in order that the Plaintiff may avail himself of the fraud, if there was any, that he must have returned them to Ely, or if he was dead at the time of the discovery of the fraud, to his representatives. You may say whether, if he offered to return them, he did so in reasonable time.

"If you find that it was not done within such reasonable time, after ascertaining that he was defrauded, he cannot avail himself of the fraud."

The Defendant's counsel excepted to the instructions or statement to the jury, that they might say whether, if Plaintiff offered to return the notes he took of Ely, he did it in a reasonable time.

And he excepted to the instructions to the jury, that they might find that the Plaintiff returned, or offered to return, them in a reasonable time, or that they might find from the evidence that the notes were returned, or offered to be returned, in such time or manner that Plaintiff might avail himself of Ely's fraud.

He excepted to the part and portion of the charge, and to the statements, that if Plaintiff was induced to enter into the obligation (take the notes) by the fraud of the principal, he may take advantage of the fraud, and that it would not operate to discharge so much as the notes represented. And he excepted to each and every instruction or statement, that if Ely was guilty in procuring or inducing the Plaintiff to take the notes, the sureties were not to any extent discharged by the taking of the notes.

He excepted to the statement in the charge that, "You have therefore to inquire whether these notes were imposed upon the Plaintiff by the fraud of Ely," and also to the instruction that it was material to inquire whether Ely made false representations, or whether he knew them to be false.

He excepted to that part of the charge in which his Honor instructed the jury, that if the notes were not imposed upon Lowman by any fraud on Ely's part, the balance of the amount of the bond, over and above the notes, was due, and could have

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been enforced against the surety before the notes became due; and to the statement that the balance could have been collected at that time.

The jury found a verdict in favor of the Plaintiff for $15,662.28.

A bill of exceptions was made and ordered to be heard, in the first instance, at the General Term, and the entry of judgment in the meantime suspended.

Upon the case being heard at the General Term, a new trial was denied. The Defendant appealed to the Court of Appeals, and the case was submitted on printed points.

E. H. Benn for Appellant.
R. King for Respondent.

MILLER, J.—The principle is well settled, that where a creditor, by a valid and binding agreement between himself and the principal debtor, without the consent of the surety, extends the time of the payment, and thus ties up the hands of the creditor, that the surety is thereby discharged (Gahn *v.* Niemcewicz, 11 Wend. 312; Colemard *v.* Lamb, 15 Wend. 329; Miller *v.* McCan, 7 Paige, 451; Bangs *v.* Strong, 7 Hill, 250; Dorlon *v.* Christie, 39 Barb. 610; 479; Fox *v.* Parker, 44 Barb. 541; Smith *v.* Townsend, 25 N. Y. 479 Billington *v.* Wagonner, 33 N. Y. 32).

The agreement must be one which can be enforced, and of such a character as will prevent the collection of the original demand, to secure which a new obligation was taken.

It must also have sufficient consideration, so as to prevent the prosecution of the debt by the owner, and to prevent the surety from compelling him to enforce it.

In the case at bar, it was claimed upon the trial, and evidence introduced to prove, that the Plaintiff was induced to enter into the agreement, and to take notes extending the time of payment, by the fraudulent representations made by the principal debtor, as to his pecuniary circumstances and responsibility.

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Fraud vitiates all contracts, and if the notes endorsed upon the bond in suit, and now in question, were received by the Plaintiff by means of the false representations alleged, then there was no valid agreement to extend the time for the payment of the bond, which was binding upon the parties. The fraud which characterized and infected the transaction entirely vitiated the contract, and rendered it utterly illegal and void.

The endorsement upon the bond of the receipt of the notes, as payment, was fruitless and unavailing, and the instrument remained in full force and effect, the same as if they never had been made. The Plaintiff could prosecute the bond, the same as if the notes had never been given, and it would be no defence, under the circumstances, that the principal had, by fraudulent means, obtained an extension of the time of payment.

The principal exceptions taken upon the trial relate to the charge of the Judge, and his refusal to charge as requested, and I will examine those which are now pressed upon our attention.

The Judge, very properly, I think, left it for the jury to determine whether the notes were imposed upon the Plaintiff by the fraud of Ely, and whether the agreement to take the notes, and to extend the time of payment, was procured fraudulently. It cannot be denied that there was considerable evidence in the case which tended to establish that Ely had falsely represented the situation of his property, and the jury were required to find that these representations were false, and that Ely knew them to be so. Clearly, there was no error in thus presenting the main issue involved in the case to the jury. The charge of the Judge that the extension of the time of payment would not discharge the surety as to the residue of the bond, beyond the amount of the notes, and all his remarks as to that branch of the case, were, I think, correct and unobjectionable. The taking of the notes for a less amount than the sum due upon the bond could, at most, but operate as a discharge of the surety to the amount of the notes, and left him unaffected as to the remainder.

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They were taken only as a conditional payment upon the bond, and to that extent only could they be effective.

If there had been an actual payment of the bond by Ely, to the amount of these notes, it would not have affected the right of action of the Plaintiff against the surety for the remainder of the bond, and the receipt of the notes could have no greater effect than a payment of money.

The theory upon which sureties are discharged is a suspension of their remedy over their right to demand that the creditor should sue the principal (Myers v. Welles, 5 Hill, 465). The remedy here could not have been suspended beyond the amount of the notes, and hence there is no good reason why the surety should be discharged beyond that sum, even if a valid agreement had been made.

If any alteration was made in the contract, it was merely to the extent of a payment pro tanto, and there would appear to be no valid and satisfactory reason why the Defendant has a right to claim any benefit beyond that.

As the jury find adversely to the Defendant upon the question of fraud, I do not see how he could have been injured by this portion of the charge.

Nor does any question arise at this time, whether two actions could be maintained upon the bond, the only question to be now determined being as to sustaining the present action.

It was also proper to submit to the jury to determine whether, if the Plaintiff offered to return the notes, he did so in a reasonable time. The Plaintiff was not aware of Ely's insolvency, until after his decease, and there was no one to whom the Plaintiff could tender the notes until an administrator was appointed. They were tendered to the administrator soon after he was appointed, and this action was commenced shortly after the tender was made.

It was probably enough that the tender was made upon the trial (Nichols v. Michael, 23 N. Y. 264, 267).

The evidence offered to prove the publication by the administrators of Parmenter, the surety, in 1859, of a notice to cred-

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itors to present their claims against the estate, was properly excluded, as it was not material to the issues upon trial, and could have no legitimate bearing upon the case.

It was not offered for the purpose of procuring a certificate according to the provisions of 2 R. S. 90, § 41, and so far as any question of costs is concerned, it would more properly arise upon a motion.

As the evidence was excluded, the request to charge as to the effect of such notince, was properly refused.

None of the exceptions to the charge of the Judge, or to his refusal to charge can be sustained, and his rulings in regard to evidence were entirely correct.

The judgment of the Court below should be affirmed

All affirm.

JOEL TIFFANY,
State Reporter.

ISRAEL CASEY, Respondent, v. HENRY M. JANES, Appellant.

Assignment for benefit of Creditors—Good faith.

The finding by the refree that the assignor, in making the assignment, had no actual design to defraud his creditors, but intended to apply his property to the payment of his debts, preferring and securing his sureties and endorsers, is a sufficient finding, in the language of the statute, that it was made in good faith, and without any intent to hinder, delay or defraud creditors.

Where the substantial findings of the referee show the assignment to be made in good faith and for a lawful purpose, it may be sustained.

This is an appeal by the Defendant from a judgment of the Supreme Court, in the Seventh District, in favor of the Plaintiff.

This action was brought to recover the possession of certain goods which had formerly belonged to one John P. Casey, and which the Defendant had levied upon under an execution against said John P. Casey, after the latter had executed a general assignment to the Plaintiff, in trust for creditors.

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The complaint stated that, on the 25th day of January, 1858, the Defendant became possessed of certain personal property of the Plaintiff, to the value of $999.15, of which he claimed a return. The answer was—first, a general denial; and by way of second defence, set out a judgment recovered by Happock and others, on the 31st day of December, 1857, against John P. Casey, an execution thereon to the Sheriff of Livingston, its delivery to the Defendant or his deputy, and the taking of the property thereunder, being the same goods and detention in the complaint mentioned.

The issues thus made were, by order of the Court, referred for trial, and were tried before the referee, July 15, 1859, when he found the following facts:

That, prior to December 18, 1857, John P. Casey was a merchant, selling goods, and largely indebted. That on that day he assigned all his property, including debts due him, to his father, the Plaintiff herein, save so much as the law exempted from execution, in trust, to sell the property and collect the debts, and from the proceeds of such sale and collections pay costs and expenses, certain preferred debts, and afterwards the residue of the indebtedness.

That the goods were worth about $1,500, and the debts and demands due the assignor amounted to over $3,000. That the assignment was executed at the store of John, in the presence of the Plaintiff, who accepted the same in writing. That the goods were not removed, but the assignor left the store, *declaring that he surrendered the possession of the store to the assignee.* That the assignor returned to the store, after an absence of two or three hours, when the Plaintiff delivered him the keys, and directed him to take charge of the same.

That the notes and accounts were taken to the house of the assignee, immediately after the assignment, and remained there one or two days, when they were brought back to the store.

That the goods remained in the store, in charge of the assignor, who was appointed an agent, as aforesaid; the said

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Plaintiff being often in the store, and occasionally examining the books and accounts.

That the Defendant, as Deputy Sheriff, took them by virtue of an execution, as alleged in the answer. That the said John P. Casey had no actual design to defraud his creditors by making the assignment.

As conclusions of law, the referee found—

1. That the title of the said goods and personal property, so seized and taken by the Defendant, was in the Plaintiff, and that he was entitled to the possession thereof.

2. That the Plaintiff have judgment for the possession of said property.

Exceptions were duly taken to the referee's report; and judgment upon this report was entered March 10, 1860, that the Plaintiff have a return of the property, and costs.

The Defendant appealed to the General Term of the Supreme Court, where, in December, 1860, the judgment was affirmed, and from that decision an appeal was taken to this Court.

George F. Danforth for Appellant.
James Wood for Respondent.

MILLER, J.—It is insisted by the counsel for the Defendant, that the findings of facts by the referee do not warrant his conclusions of law. The ground upon which this position is based is, that the Plaintiff, as assignee, could acquire no title under the assignment as against a judgment-creditor, unless, in accordance with the provisions of the Revised Statutes (2 R. S. 136, § 5), it was accompanied by an immediate delivery, and followed by an actual and continued change of possession of the property in question, or unless it was made to appear on the part of the assignor that it was made in good faith, and without any intent to defraud creditors; and that neither of these facts are found by the referee.

I think that the finding of the referee substantially covers the ground of the objection, and was sufficient.

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He found that the assignor had no actual design to defraud his creditors, by making the assignment, but intended to apply his property to the payment of his debts, preferring and securing his sureties and endorsers.

This finding is equivalent, I think, to saying that the assignment was made in good faith, and without any intent to defraud creditors.

The finding is very clear, that the assignor had no such intent, which, I think, embraces good faith; for if he had no such design, it could not well be that the assignment was made in bad faith.

But if this language may not be considered as disposing of or embracing the question of good faith, the subsequent phraseology employed showed due intention to appropriate the property of the assignor to the payment of his debts, according to law, and thus manifest good faith, and rebuts the idea of any other or different presumption.

It is said that the assignment is void upon its face, for two reasons: First, because it delays the payment of creditors until the debts and demands are collected and found uncollectable.

And secondly, because it authorizes the assignee to appoint attorneys, one or more, under him, with full power of substitution or revocation, ratifying whatever the said attorney may do.

As to the first objection, it is urged that under the clause in the assignment containing the provision objected to, the assignee may postpone the payment of any creditor until the last dollar is collected, or until he is satisfied that the debts are uncollectable, and thus places it within the discretion of the assignee to determine when he shall pay. I think that this is not a fair and reasonable interpretation of the clause in question.

By the assignment the assignee is required to collect the debts and demands due, and to become due, "or so much of them as may be found collectable," and to dispose of the moneys received as provided for in the assignment.

I do not understand that this provision is intended to vest

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any discretionary power with the assignee as to the time when the debts are to be paid, but merely to provide against the necessity of collecting debts not collectable, before distribution.

It does not expressly authorize any delay, but simply exonerates the assignee from liability to account for those debts which he has been unable to collect, by reason of the insolvency of the debtors, or for any other good cause. Nor does it authorize any more discretion than can properly be exercised as to the collection of debts which are good, and which, by the terms of the assignment, he is bound to collect.

It is the usual provision inserted in assignments, more for the protection of the assignee against liability for demands against insolvent and irresponsible parties than for any other purpose.

And it would be no defence to an action brought to compel the assignee to account, that in his judgment and discretion he chose to consider certain debts uncollectable, and therefore was not ready to account.

In fact, there is no good and valid reason why an assignee would not be compelled to make a partial distribution of moneys collected, when a portion of the debts only remain unpaid, because of the doubtful character of the latter demands. Nor why he should not sell and dispose of such demands at public sale, when the interests of the estate demand such a disposition of them.

The authorities to which we have been referred, to uphold the position taken, do not, I think, sustain any such doctrine (see Nicholson *v.* Leavitt, 6 N. Y. 510; Dunham *v.* Waterman, 17 N. Y. 1; Storm *v.* Davenport 1 ,Sandf. Chan. R. 135); nor does the provision in question suspend the power of the assignee to apply the estate, without delay, as required by law.

As to the second objection: The authority to appoint attorneys for the transaction of the business is not conferring power to appoint a new assignee, but simply investing the assignee with the customary authority to employ other persons to act for him, when circumstances may render it necessary, and

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when for good and sufficient reasons he is unable to give the business his personal supervision and attention.

The authority would doubtless exist without such a provision, but I see no objection to its insertion, for greater safety and security, in the body of the assignment. And unless some such power was given expressly, or was implied, the assignee would be without authority to appoint an attorney for some matters connected with the assignment, which he could not well attend to personally.

The objection made, that the referee erred in finding, as a conclusion of law, that the title to the property taken by the Defendant was in the Plaintiff, rests upon the facts proved, which, it is claimed, establish that the assignment was fraudulent and void, and made in bad faith, and with an intent to defraud creditors.

Preferential assignments, although tolerated by law, have always been regarded with much suspicion, and unless free from fraud and unfairness, should not be sustained.

It must be conceded that, upon the trial before the referee, the facts proved attending the change of possession, and the manner in which the business was conducted, were calculated to cast suspicion upon the transaction.

It appeared that the goods were allowed to remain in the store where they had previously been, after the assignment; that the same sign remained over the door; that the assignor continued to occupy the house without any rent being fixed; transacted the business; sold and exchanged goods; collected accounts, and used the money with the consent of the assignee.

This proof was met, on the part of the Plaintiff, by evidence that the assignor was employed and acted as agent of the assignee, who was frequently—sometimes as often as two or three times a day—at the store, consulted with the assignor, examined the books, and to whom an account was rendered of the business.

Although many of the circumstances proved furnished strong evidence of a fraudulent intent, and presented badges of fraud

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and circumstances of suspicion which were proper for the consideration of the referee, yet, with the accompanying explanations, they were not entirely conclusive.

So also the declarations of the assignor, which are relied upon to establish a fraudulent purpose, to this effect—that he wanted the assignment made before judgments matured, and executions issued; that he wanted to make an equal division among all his creditors, and that he did not want his property sacrificed, were to be considered by the referee, upon the question of intent, but are not entirely controlling against the validity of the assignment. The question at issue as to the delivery and change of possession of the property assigned, and the good faith of the assignor in making the assignment, without any intent to defraud creditors, as well as the question whether the assignment was made with an actual intent on the part of the assignor to prevent the sale of his property on execution, and thereby to hinder and delay, or to defraud his creditors, were questions of fact for the determination of the referee.

This Court cannot interfere with his decision in questions of facts, even if the proof is of such a character as to create some hesitation and doubt.

Certainly, in this case the facts are not so plainly and clearly against the decision of the referee as to make it entirely manifest that a question of law alone arises.

As there was no error in the trial, the judgment must be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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MILO PRATT *v.* LUCIEN D. COMAN, IMPLEADED, &c.

Promissory Note—Consideration—Giving up old note.

The giving up a note past due to the maker and taking in lieu thereof a negotiable note not yet matured, postpones the immediate right of action for such original debt and makes the owner of the latter note a holder for value.

THIS case comes here on appeal form a judgment of the Supreme Court, affirming a judgment for the Defendant, entered on a report of the referee.

The action was brought on a promissory note, made by the Defendant Coman, dated June 4, 1859, for $3,000, payable six months after date to the order of one Agnew, and by him endorsed to the Plaintiff.

The answer set up the defence that Agnew, by false representations, induced Conan to buy certain stock in the Etna Mining and Manufacturing Company, and that the Defendant

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Bills and notes—Bona fide holders. 43 *N. Y.* 211; 44 *N. Y.* 374; 51 *N. Y.* 326; 60 *N. Y.* 88; 65 *N. Y.* 441; 81 *N. Y.* 224; 137 *N. Y.* 118 (50 *St. Rep.* 198); 6 *Hun,* 202; 26 *Hun,* 664; 39 *Hun,* 592; 64 *Hun,* 461 (46 *St. Rep.* 200; 19 *N. Y. Supp.* 776); 85 *Hun,* 382 (66 *St. Rep.* 465; 32 *N. Y. Supp.* 981); 9 *App. Div.* 328 (75 *St. Rep.* 758; 41 *N. Y. Supp.* 342); 30 *App. Div.* 364 (51 *N. Y. Supp.* 975); 42 *App. Div.* 417 (59 *N. Y. Supp.* 246); 59 *How. Pr.* 297; 2 *Abb. N. C.* 277; 10 *Abb. N. S.* 373; 11 *Misc.* 9 (63 *St. Rep.* 439; 31 *N. Y. Supp.* 841); 26 *Misc.* 479 (57 *N. Y. Supp.;* 518); 54 *Super. Ct.* 443 (7 *St. Rep.* 39); 36 *Super Ct.* 371.

Time of payment—Extension by taking collateral security. 52 *N. Y.* 142; 57 *How. Pr.* 508; 8 *Daly,* 275; 1 *City Ct.* 25.

Promissory note—Consideration. 42 *N. Y.* 442; 91 *N. Y.* 369; 7 *Lans.* 4; 36 *Super Ct.* 279; 23 *St. Rep.* 371 (5 *N. Y. Supp.* 743); 1 *City Ct.* 278.

Note of third person—Effect of acceptance. 37 *Hun,* 605; 56 *How. Pr.* 496.

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gave the note in suit in payment thereof. The referee found the fact that the note was procured by fraud, and that Agnew endorsed the note to the Plaintiff before maturity. That Agnew being indebted to the Plaintiff in a large sum of money, for which the Plaintiff held Agenw's overdue notes, the Plaintiff gave up to Agnew said overdue notes, and received therefor the note in suit, and new notes made by Agnew for the balance; and that the Plaintiff took the note in suit without notice of any defence.

The referee found that the notes so due from Agnew to the Plaintiff were surrendered by the Plaintiff to Agnew; and this note of Defendant's, with Agnew's endorsement, was delivered by Agnew to Plaintiff, for and as a part of said indebtedness, and the note or notes of Agnew given for the balance.

That no agreement was made at the time that said note in suit should be a payment of so much or any part of said indebtedness, nor was anything said on the subject, the transaction being simply a surrender of the old notes, and the endorsement over of this, and the giving of the other notes. Upon these facts the referee held that the Plaintiff was not a bonâ fide holder for value, and allowed the defence, and gave judgment for the Defendant, which judgment was affirmed by the General Term of the First District, and the Plaintiff has appealed to this Court.

Charles Tracy for Appellant.
E. L. Fancher for Respondent.

MASON, J.—The Plaintiff upon the conceded facts of this case, must be regarded in law a bonâ fide holder for value of the note upon which this action is brought. I do not deem it important to inquire in this case whether the receipt of the note in suit by the Plaintiff, and the surrender to Agnew of his note, to take up which this note was received by the Plaintiff, was, under the facts as found by the referee, a discharge and satisfaction, or payment of the debt of which the note surrendered by the Plaintiff was the evidence. The general rule of pre-

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sumption, it seems to me, should be that the Plaintiff intended to relinquish his claim evidenced by Agnew's note, and take this note of Coman in its stead, or in payment of, or discharge of, such demand.

The giving up to Agnew of his note, and taking the note in suit for it, according to every rule of presumption known to the law, is evidence of the intention of the parties to cancel the note. Be this as it may, however, if it did not discharge the pre-existing debt, it certainly operated to cancel the negotiable paper of the Plaintiff; and this, as I understand the law, is parting with value sufficient to constitute the Plaintiff a bonâ fide holder of this note.

This was expressly held in the case of Young v. Lee (18 Barb. R. 187, 191, 192), and affirmed in this Court in 2 Kern. R. 551. Judge Welles, in delivering the opinion of the Supreme Court in that case, very justly remarks, that "Admitting that the Plaintiff could have recovered against Bell & Goodman the amount of the note surrendered under the facts stated, it does not follow that they have parted with nothing of substantial value. Their demand against Bell & Goodman, in the shape of negotiable bank paper, was better and more available, on many accounts, than if it remained in an open unliquidated account."

This case was affirmed, as we have already said, in 2 Kern. R. 551, and the head-note, which is an accurate statement of what the case decides, is as follows: "Where the owners of a note due in a few days, which was deposited for collection with the bank where it was payable, withdrew it from the bank, and surrendered it to the maker, on receiving from him his note payable in three months, endorsed by a third person—held, that they were holders of the note last named for value to the amount of the note surrendered."

The same rule was affirmed in the Supreme Court in the case of the Bank of Salina v. Babcock and others (21 Wend. 499), in which it was held that "Where a bank receives and discounts negotiable paper, places the proceeds to the credit of the holder,

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and charges the avails over against him and cancels the other notes, upon which are responsible parties, but which notes are overdue and lie under protest, such cancellation is equivalent to paying value at the time, and precludes all defence existing as between the original parties." And Judge Nelson, in delivering the opinion of the Court, at page 501, says: "The Court ought not to speculate about the probability of reviving these canceled securities, in case the paper, upon the strength of which they were canceled, should turn out to be unavailable; much less ought we to go into a calculation of the chances of revival as to the ground of defeating the substituted security." He adds that "It is enough that the Plaintiffs, in good faith, charged over and cancelled them according to usage, and held them merely to be sent home. This is parting with value in the strictest sense of the term. The Plaintiff had a right to give up the old securities upon the faith of the new paper, and they have done an act that is equivatent, and so intended." The case of Day *v.* Saunders, unreported,* holds that if the note was received in payment, the Plaintiff is a bonâ fide holder.

There is another view which may be taken of this case, which, to my mind, shows conclusively that the Plaintiff parted with value in surrendering up Agnew's note which was past due, and taking this note in suit, made by the Defendant, in its stead, and which had six months to run before it was due.

The law is well settled that the acceptance of such a note on time, though not received as an absolute payment of the original debt, suspends the right of action on the original debt until the note becomes due or is dishonored (Putnam *v.* Lewis, 8 J. R. 389; 5 T. R. 513; Edwards on Bills and Notes, 197, 199, 200; 1 Bing. R. 100). The debt from Agnew to the Plaintiff being due, and the Plaintiff, at the time of surrendering the old note, having the right to enforce its payment presently, and which right he relinquished by receiving the note in suit, and his power to collect the orig-

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inal debt from Agnew being suspended until the note in suit should mature, he certainly parted with value, which constituted a sufficient consideration to make the Plaintiff a bonâ fide holder of the note in suit (Burns v. Rowland, 40 Barb. R. 369). It is true the Plaintiff had Agnew's endorsement upon the note in suit, but this was only a contingent liability at the end of six months, and the Plaintiff was bound to protest the notes to charge him (Jones v. Savage, 6 W. R. 658; 7 Mass. R. 286; 4 Verm. R. 549; Edwards on Bill and Notes, 197, 198).

I will, without further consideration or reference to authorities, only say that I am entirely satisfied that both upon principle and authority the Plaintiff, upon the facts found by the referee in this case, must be regarded as a bonâ fide holder for value of the note upon which this action is brought.

It follows that the judgment of the Supreme Court should be reversed, and a new trial granted, costs to abide the event, which I advise to be done.

MILLER, J.—This was an action on a promissory note for $3,000, payable six months after date to the order of one Agnew, and endorsed by him. The Defendant, the maker, set up as a defence that Agnew, by false representations as to the value of certain stock, induced Coman to buy it, and to make this note in payment.

The cause was referred, and the referee found that the note was procured as alleged in the defence; that Agnew endorsed the note to the Plaintiff before maturity, and being indebted to the Plaintiff in a large sum of money, for which he held Agnew's overdue notes the Plaintiff gave up to Agnew said notes, received the note in suit, and new notes for the balance, and took the note in suit without notice of any defence thereto. He also found in favor of the Defendant.

The judgment was affirmed at General Term in the First District.

In Brown v. Leavitt (31 N. Y. 113) it was held that the

*1 Transcript Appeals, p. 352.

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holder of a promissory note transferred for a note already due is a holder for value. I am unable to discover why the case at bar does not come within the principles here laid down. Another note was given up by the Plaintiff, and he took the note in question before maturity, and without notice of any defence existing to it. Having surrendered an existing obligation in his hands for the note in suit, he became a holder for value.

It is said that the note given up was only evidence of a debt for money lent, and that Agnew, being liable as endorser, the Plaintiff was not prejudiced by taking the note in suit. I think it a conclusive answer to this position, that he might be prejudiced by the delay in prosecuting Agnew as endorser, and that no action could be maintained against him until the new note became due. By surrendering the old note the Plaintiff's right of action was given up on that demand, and hence he could not press the collection of his debt until the new note became due; and by the delay he lost a right which he possessed when he obtained the note, and suffered an injury.

In the case cited the like feature of endorsement existed (see also Bank of Salina *v.* Babcock, 21 Wend. 499; Mohawk Bank *v.* Corey, 1 Hill, 513; Bank of Sandusky *v.* Schoville, 24 Wend. 115).

Nor does it, in my opinion, alter the case, because the original indebtedness was for money lent.

If this was not merged in the first note given, I think it became extinct by the exchange of that note for others; and as there was no evidence to show that it was not intended as a payment, the presumption would be that it was so intended. But conceding that it was not thus merged, it cannot be denied that the taking of the note in suit delayed the collection of the original debt, pro tanto, and thereby the Plaintiff was injured and lost a right which he possessed, which would entitle him, upon the principle applicable to such cases, to occupy the position of a bonâ fide holder for value.

The judgment should be reversed.

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WOODRUFF, J.—In this case the facts which are material to the precise question may be stated in simple form, thus: The Plaintiff loaned money to Agnew, to a large amount. For that money the Plaintiff held Agnew's notes, which were past due. Agnew, on the 4th of June, 1859, *by fraud,* procured from the Defendant his note for $3,000, payable to his (Agnew's order six months after date. Agnew, before its maturity, endorsed and delivered such note to the Plaintiff, on account of and as part of said indebtedness, and the Plaintiff thereupon gave up to Agnew his own notes, which were past due, receiving for the balance of such indebtedness Agnew's new notes.

The Plaintiff received the Defendant's note in good faith, without notice of anything impairing its validity in the hands of Agnew. Did this transaction make the Plaintiff a holder for value, entitling him to recover from the Defendant, notwithstanding the fraud by which Agnew obtained the note from him? It is settled in this Court by Young *v.* Lee (12 N. Y. 555), that the receipt of a note in extinguishment of a demand upon a note *not yet due,* constitutes the recipient a holder for value, although the debtor endorsed the note at the time of the transfer. And in Brown *v.* Leavitt (31 N. Y. 113) it was decided that where the Plaintiff, being the holder of a note which was *past due,* surrendered it to the maker on receiving from him the Defendant's note payable to the order of such maker, not yet due, endorsed by a third party, and certain other notes and money in payment, such Plaintiff was a holder for value, and evidence of the transactions between the maker and payee was not admissible to impeach the validity of the note. (See Day *v.* Saunders, decided in this Court in 1867 —not yet reported.)* In the belief that all the questions conceded with the inquiry, what constitutes a holder for value, heretofore so much agitated in our Courts, are not yet settled, the Respondent points us to the fact that there was a distinct indebtedness for money lent, constituting a cause of action against Agnew for the money lent, unimpaired by the

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transaction; and that he cannot be said to have received the present note in *payment* of a precedent indebtedness, nor to have in anywise given or party with value upon faith of the note of Defendant, endorsed to him by Agnew.If it had distinctly appeared that the parties agreed, on the endorsement of this note, that it should simply be held as security for the debt due to the Plaintiff for the money loaned, the Plaintiff retained the right to sue for such debt at any moment he saw fit, the case of Coddington *v.* Bay (20 J. R. 637), and Stalker *v.* McDonald (6 Hill, 93), would have applied to the transaction. But upon the facts proved it is clear that, in the first place, the notes of Agnew first given for such debt operated to extend the time of payment of the money loaned until they matured; and upon the endorsement of the note in question to the Plaintiff, and the surrender and extinguishment of those notes, the time of the payment of the loan, pro tanto, was extended to the maturity of the Defendant's note.

This reduces the question to the simple inquiry, does the giving of time to the debtor, by receiving a security payable at a future day, constitute a giving or parting with value within the meaning of the rule?

I think it does. Giving time is a good consideration for a promise. Giving time impairs the right of a creditor as against his debtor. The immediate right to sue may be of great importance as a security.

The law holds it material where it declares that giving time to a principal debtor releases a surety, on the ground that the right of immediate pursuit is valuable. So as to the maker of a note in favor of an endorser. So the giving of time is a sufficient consideration for the obligation of a surety or an endorser. On this ground I think the judgment should be reversed.

All reverse.

JOEL TIFFANY,
State Reporter.

*1 Transcript Appeals, 352.

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANTS, *v.* BYRON P. TUBBS, MARENUS TUBBS, AND JAMES WITHERS, RESPONDENTS.

Forfeited Recognizance—Excuses—Sickness.

When a party is under a recognizance with proper sureties to appear at Court to answer, &c., and he is prevented by sickness from fulfilling the terms of his recognizance, such fact will be a good defence to an action brought upon his estreated recognizance.

Sickness of the principal is to be deemed such an act of God as to excuse the sureties from having his body before the Court, according to the terms of the recognizance.

APPEAL from judgment entered upon the report of a referee, affirmed at a General Term of the Supreme Court for the Fifth District.

This action was to recover the sum of one thousand dollars, for the breach of an alleged recognizance, by which the Defendants were bound for the appearance of the said Byron P. Tubbs, at a Court of Sessions in Madison county, which was held at Morrisville, on the 23d of March, 1863, to answer an indictment for perjury, and stand trial, &c.

The answer denied all the allegations in the complaint, except that Tubbs was indicted, and further averred that, at the time when Tubbs was called, and the other Defendants were required to produce him, viz., on the 23d of March, 1863, he "was sick and unable to go or to be carried to said Morrisville," and his non-appearance to answer "was wholly without his fault or the fault of his said bail."

The action being referred and tried, the referee found:

First. That the recognizance upon which this suit was

Evidence—Competency—Consent. 66 *Hun,* 250 (49 *St. Rep.* 540; 21 *N. Y. Supp.* 182).

Contracts—Performance—Excuse. 159 *N. Y.* 38 (6 *Ann. Cas.* 333); 53 *How. Pr.* 126.

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brought was not entered in the minutes of the Court, and the substance thereof read to the parties recognized.

Second. That the minutes of the Court at which such recognizance is claimed to have been entered into, are kept in brief on sheets of paper attached together, and that in this case only the title of the cause, the name of the principal and sureties, the amount of the bail, in figures, the time at which the principal was to appear, and the cause for which he was to appear, were written in the said minutes; that the recognizance was put into form and written in a book kept for that purpose after said Court had adjourned, and that said recognizance, as repeated to prisoner and sureties, was not on the minutes kept in said Court.

Third. That the Defendant, Byron P. Tubbs, did not appear, &c.

Fourth. That said Byron P. Tubbs was *unable* to appear at said Court of Sessions, by reason of sickness and injuries arising from being thrown from a horse shortly prior to said March Term of said Court of Sessions.

And he states his conclusions of law:

First. That the recognizance upon which this action is brought was not executed in accordance with the requirements of the statute, and is void by reason thereof.

Second. That the sickness of the Defendant, and his injuries, disabling him from appearing at said March Sessions, is an excuse for his non-appearance thereat, and a valid defence to this action.

He therefore directed judgment for the Defendants for costs, which was entered accordingly.

The special finding contained in the case, as settled by the referee, reiterates the findings embodied in his report, with the further findings, that the Defendants did, in open Court, at the time alleged, enter into the recognizance mentioned in the complaint, a copy of which was given in evidence; and that Byron P. Tubbs failed to appear, and an order was made by the Court estreating said recognizance, and ordering the same to be

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prosecuted as alleged in the complaint. To a question put to Mr. Tubbs, when examined as a witness, viz.: "Were you able to go to Court during Court week?" the Plaintiff's counsel objected, and to its admission excepted.

From the judgment of affirmance the Plaintiffs appealed to this Court.

D. C. Cameron for the Appellants.
H. O. Southworth for the Respondents.

WOODRUFF, J.—The referee has found as a fact that the Defendant, Byron T. Tubbs, the principal, *was unable* to appear at the term of the Court at which he was, by the alleged recognizance, bound to appear, and at which, for such non-apearance, the said recognizance was estreated. And also that such inability was by reason of sickness and injuries arising from being thrown from a horse shortly prior to said term of the said Court.

These facts we are not at liberty to question.

The case is before us in a form of permitting us to review questions of law only (Code, §§ 272, 268).

There was evidence in support of this finding, and it was competent for the Supreme Court to reverse if the findings were not satisfactory to them upon this point. We have no such power.

The question of law upon this finding is, Does an inability of the principal to appear, "by reason of sickness and injuries arising from being thrown from a horse prior to the term of the Court," constitute a defence to an action upon Defendant's recognizance?

I do not think that this should be regarded as an open question in this State. The recognizance is but a solemn contract. It is made of record, but that does not withdraw it from the general rule applicable to contracts, whether by parol, in writing, under seal, or in whatever form they are entered into.

In this State it is settled that the act of God or of the law will excuse the non-performance.

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As to contracts in general, see Wolfe *v.* Howes (20 N. Y. 197) in this Court, affirming the decision of the Supreme Court (24 Barb. 174), and citing cases, text-writers, and reports from other States establishing the doctrine. The case of a replevin bond—Carpenter *v.* Stevens (12 Wend. 589). And as to recognizances in particular, see The People *v.* Manning (8 Cowen, 297); The People *v.* Bartlett (3 Hill, 570); The People *v.* Cook (30 Barb. 110).

The inability of the principal to appear, by reason sickness, is, within these cases, the act of God which excuses, and is a sufficient defence.

On the trial, Byron P. Tubbs, the principal in the recognizance, was examined as a witness, and testified to his illness; that he was hurt on Friday; that on Monday, when the Court commenced, he had not got up; that he was confined to his bed nine days. The question was then put to him—"Were you able to go to Court during Court week?" To this question the Plaintiff's counsel objected, and excepted to its allowance.

The witness answered: "No, sir; I was not able during Court week to go to Morrisville, and could not have gone."

It is argued that this was objectionable, because the witness wa not an expert, and that it was permitting the witness to determine a question of fact which it was within the province of the referee to determine.

Witnesses are often permitted to testify in the very terms in which a referee, or the Court, or the jury are to determine an issue—e.g., on an issue touching the making of a note, or the signing of an instrument; if the alleged signer be a competent witness he may testify in terms that he did not sign it, or that the signature is not in his handwriting. Or in an action for an assault and battery, the Defendant, when a competent witness, may be asked, and he may testify that he did not strike the Plaintiff; and the like is true in examples that might be multiplied almost indefinitely. The objection, therefore, that this was the very matter which the referee was to

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decide, amounts to nothing. He was to decide upon *all the* evidence bearing on the question, and the witness, in all such cases, may be contradicted, and his testimony be, perhaps, wholly discredited.

Was the evidence objectionable, as calling for the opinion of an expert? No such suggestion was made on the trial, and if it had been suggested it is possible that the Defendant might have obviated the objection by proof that the witness had every qualification of medical skill and experience which constituted the most thorough expert.

But I aprehend that the question did not call for an opinion. It was addressed to the conscious knowledge of the witness of the extent of his prostration. It added very little to what he had previously stated, viz., that he was *confined to his bed;* but whether more or less, it is clearly competent for the witness to describe his actual condition. If he could not sit up, he knew it, presumptively, better than any one else; not as an opinion, but as a matter of fact of which he was conscious, either from sensation or experience. So if he could not raise his arm, or could not walk, or could not go to Court.

I think the objection was properly overruled.

If these views are correct, the judgment must be affirmed, whatever our views may be of the sufficiency of the recognizance.

All concur.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE EX REL. GLENN'S FALLS INSURANCE COMPANY *v.* HENRY FERGUSON ET AL., THE ASSESSORS OF QUEENSBURY.

Certiorari—Assessments—Corporation—Capital.

Under the statutes respecting assessments, passed in 1853, and also in 1857, insurance and other corporations are to be assessed upon the actual value of their capital; and in determining the value of the capital stock, allowance must be made for their contingent liability on their policies which are outstanding.

A refusal on the part of assessors to make deductions for such contingent liabilities, is an error which may be corrected by certiorari.

THIS was a common law certiorari to review the action of the assessors of the town of Queensbury, and compel them to strike from the assessment roll of said town, for 1866, an assessment for personal property, and an entry on the assesment roll of personal property erroneously omitted in 1865. Instead of a return, the case has been argued upon a statement agreed upon as the facts, with a stipulation for the entry of judgment.

The case presents two questions for consideration:

1. Was the entry on the assessment roll of $30,000, as for

Taxes—Assessments—Review. 39 *N. Y.* 516; 72 *Hun,* 129 (55 *St. Rep.* 188; 25 *N. Y. Supp.* 342); 83 *Hun,* 377 (64 *St. Rep.* 753; 31 *N. Y. Supp.* 957); 37 *App. Div.* 336 (57 *N. Y. Supp.* 493); 7 *Misc.* 300 (58 *St. Rep.* 549; 28 *N. Y. Supp.* 144); 27 *Misc.* 38 (57 *N. Y. Supp.* 259).

Taxes—Stocks—Value. 166 *N. Y.* 142; 6 *Hun,* 558; 1 *T. & C.* 639; 46 *How. Pr.* 232; 1 *Sheld.* 349; 45 *St. Rep.* 622 (19 *N. Y. Supp.* 78).

Tax assessments—Deductions—Statutes. 76 *N. Y.* 73; 126 *N. Y.* 444 (38 *St. Rep.* 237); 166 *N. Y.* 136; 161 *N. Y.* 204; 37 *App. Div.* 336 (57 *N. Y. Supp.* 493).

Taxes—Insurance companies—Contingent Liabilities. *D.* 166 *N. Y.* 141; *D.* 166 *N. Y.* 143; 31 *Misc.* 437, 438 (65 *N. Y. Supp.* 526, 527) 61 *Barb.* 284; 6 *Lans.* 109.

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personal property, alleged to have been erroneously omitted from the roll of 1865, authorized?

2. Was the assessment for $40,000, as for personal property, legal?

The first question was decided in favor of the Relators by the General Term, and as no appeal is taken from that decision by the assessors, the point does not arise in this Court, and the statement of facts respecting the same is omitted here.

Second. Upon the liability of the relators to an assessment of $40,000 for personal property, the facts are these: The capital of the corporation is $100,000, all of which is paid in, and its surplus profits is $141,932.55; making, in all, $241,-932,55.

Its assets are the following:

U. S. Securities	$160,400 00	
Bonds and mortgages	36,305 56	
New York bounty loan	3,000 00	
198 shares bank stock	9,900 00	
Cash on hand and in bank	19,575 59	
Cash due from agents	7,251 40	
Real estate, office, &c	5,500 00	
		$241,932 55

Of these the following are exempt from taxation, or are otherwise taxed, viz.:

U. S. securities	$160,400 00	
Bank stock	9,900 00	
Real estate, office, &c	5,500 00	
And the following items are to be deducted, viz.:		
Loses unpaid	9,642 00	
10 per cent. on its capital	10,000 00	
		$195,442 00
Leaving, after these deductions		$46,490 55

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It further appeared that there were outstanding policies of insurance, in full force, exceding in amount $22,000,000, on which the premiums had been received and in cluded in the assets of the company, and that it would cost $80,000 to reinsure such outstanding risks. It was also shown that said corporation made a dividend of 10 per cent. last January, which was the first dividend it had ever made; that there had been some sales of its stock just prior to such dividend, at ten or twelve per cent. premium,, which was the highest price ever paid for said stock, or for which it had ever sold; that since said dividend there had been several sales, but none at a higher price than par value, together with interest added from date of dividend to time of sale. The assessors refused to make any allowances on this account, but assessed the company upon the sum of $40,000. In their appeal to the General Term of the Fourth District, this decision was affirmed, and the Relators now appeal to this Court.

S. Brown for Appellants.
Isaac Mott for Respondents.

HUNT, CH.J.—Prior to the year 1853 moneyed corporations were assessed upon the amount of their nominal capital, whether its value in fact was more or less than its nominal amount (People *v.* Dolan, 36 N. Y. R. 62). In that year, and again in 1857 (Laws 1857, 2d vol. p. 1), the statute was amended, so that the assessment was made upon the capital stock and its surplus profits exceeding ten per cent., "at its actual value." The principle of assessing upon the actual value of the stock, instead of its nominal amount, was then introduced (auth. sup.).

The rule of assessing individuals upon their personal property is expressed in different language. It is in these words: "The full value of all the taxable personal property owned by such person, after deducting the just debts owing by him" (1 R. S. 381). The assessors, and the General Term, held that

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these two provisions furnished substantially the same rule. They held that the contingent liability of the company was not a debt owing by it, and that no deduction could therefore be made from the assessment on that account. I agree that this liability was not a debt owing by the company, and that if the same facts had been presented in behalf of an individual, he would not have been entitled to the deduction now claimed. If it is a debt, to whom is it owing? If a debt, what is its amount in figures, and upon what policy has it accrued? It is impossible to answer these questions, because, in fact, there is no present debt to any one.

I do not, however, agree in the conclusions of the Supreme Court, that therefore there can be no deduction on account of this circumstance. These questions are pertinent and conclusive in the case of an individual. He is entitled to deduct only the "just debts owing by him." As to him, there must be a creditor to whom the debt is owing, an amount certain, or capable of being reduced to certainty, and a contract or judgment upon which a debt arises. Not so, however, as to a corporation like that in question. The rule of assessment there is "the actual value" of the capital. If a corporation or an individual has an actual estate in posession of $100,000, and is liable as guarantor, or indemnitor, or endorser, or bail, for $50,000, and the principal in all these liabilities is insolvent, so that he will certainly have to pay the $50,000, is not the actual value of his estate reduced by that amount? True, he canot be said to owe that amount until the lapse of time, or a notice of non-payment, or some other occurrence will entitle some other party to commence an action against him. His actual estate, however, is reduced in value by just that amount. No assessor or individual could justly say that "the actual value" of his estate, subject to these contingencies, was as great as it would be if free and clear from them. No man would give him as much for his estate, subject to these claims, as if there were no such claims. Whether tested by the standard of market or selling value, or by what it will ultimately pro-

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duce to the possessor, the contingent liabilities make a reduction of value (Oswego Starch Co. *v.* Dolloway, 21 N. Y. 458). I think it was an error in the assessors to refuse to make these deductions. There was no practical difficulty in reaching a result by the aid of authentic tables, and by such evidence as long-established insurance companies can readily furnish. It was the duty of the assessors to act upon the evidence before them, and to adjudge how much the actual value of the stock was reduced by these contingent liabilities, and to deduct from the assessment accordingly.

The evidence, as presented, showed that the reduction would more than equal the surplus as found by the assessors, and there was nothing in contradiction or disparagement of this evidence. There action is judicial, and to be governed by the evidence before them. All the evidence before them in the present case showed that there was a contingent liability sufficient to absorb all the surplus, and I see nothing to cast doubt or suspicion upon it. The assessors should have decided in accordance with the evidence (People *v.* Reddy, 43 Barb. 543; Oswego S. Co. *v.* Dolloway, 21 N. Y. R. 460). There is nothing in the case to indicate that the roll is not still in the hands of the assessors; and they may yet correct their error by striking out the assessment of $40,000 for the year 1866.

The judgment should be reversed, and the assessors ordered to correct the roll by striking out said sum of $40,000, assessed to the Appelants for the year 1866.

Reversed.

JOEL TIFFANY,
State Reporter.

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WILLIAM DAVIS v. WILLIAM E. KEYES, IMPLEADED WITH ROBERT KNOX AND ANOTHER.

Co-partnership—Dissolution—Notice to Dealers.

The law does not determine the exact kind of notice to be given to the creditors of a firm, of the dissolution of a partnership. The law intends that the creditor shall have notice of the dissolution; therefore any act from which it can fairly be inferred the creditor had such notice, is proper to be given to the jury.

CLERKE, J.—This is an action on a promissory note, made by the firm of Knox & Co. The Plaintiff endorsed it for the accomodation of the firm, and when it became due he was compelled to pay it. Knox succeeded on the defence, on the ground of infancy; and Keyes, the Appellant, rested his defence on the ground of withdrawal from the firm, prior to the making of the note, and that notice of dissolution was given to the Plaintiff before he endorsed it.

Knox, senior, and the Defendant Keyes, both testified that notice of dissolution was inserted in two newspapers, without producing them. They gave no particulars, and did not prove that the Plaintiff had any knowledge of the notice. It seemed to be conceded that the Plaintiff was a previous dealer, and was entitled to special notice of the dissolution.

The Plaintiff, on the one part, and Keyes and Knox, junior, on the other, executed, on the 6th of April, 1864, an indenture of lease of the premises on which the latter transacted their business, for the term of three years. At the time the Plaintiff testifies that he had transactions with them, he does not say whether there were any other transactions than the execution and delivery of the lease. He was in the habit of visiting the premises, sometimes, subsequently, and received soap from them towards paying the rent. He evidently credited them for the rent. Indeed, as I have said, it seems not to have

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been disputed, at the trial, that he was entiteled to special notice of the dissolution before he endorsed the note. So that it seems to me the only question at the trial was, whether the Plaintiff had received such notice. The evidence in relation to it was conflicting, and the jury found for the Plaintiff.

The motion for a new trial was properly denied.

There are no exceptions in the case.

The judgment should be affirmed, with costs.

Affirmed.

JOEL TIFFANY,
State Reporter.

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DAVIS v. KEYES,

Co-partnership—Dissolution—Notice to Dealers.

A creditor of the firm, who has been accustomed to deal with the partnership, is entitled to special notice of dissolution, to exonerate the retiring partner. A general notice which cannot be brought home to the knowledge of the creditor is not sufficient.

CLERKE, J.—This case differs from the other case between same parties in one point, and only in one. The Judge charged the jury—relative to notice to the Plaintiff of the dissolution of the copartnership—that "The law exacts of persons, when they retire from a partnership, that they shall notify the creditors or persons who have dealt with them of that fact, and the fair intendment of the rule is, that such persons shall be notified in the ordinary business way. Casual conversations in the street, which parties do not remember, in relation to such a fact, can hardly be said to be such a notice, unless the parties interested are distinctly apprised, and know at the time that it was intended as such notice." As I understand the law, all that it requires is, that if the creditor had knowledge of the dissolution of the copartnership, at the time the credit was given, he cannot recover against the members of the firm who have withdrawn. It matters not how that knowledge has been communicated; if the creditor is in possession of it, he cannot recover. To be sure, casual conversations in the street might have been forgotten or disregarded; but it was for the jury to determine, under the proof and all the circumstances, whether the notice was effectual or not. To say that a particular kind of notice was essential, was calculated to lead the jury from the consideration whether the Plaintiff had any notice that communicated to him knowledge

Partnership—Dissolution—Notice to dealers. 18 *Hun,* 315.

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of the dissolution; and, I think, if the Judge did not intend to charge absolutely that the law required a particular kind of notice, when the counsel for the Defendant excepted to that part of the charge to which I have referred, he should have explained his meaning more explicit to the jury. The judgment should be reversed, and a new trial ordered, costs to abide the event.

All reverse.

JOEL TIFFANY,
State Reporter.

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2. ———— *Chose in Action—Payment by Debtor—Supplementary Proceedings—Debtor of Judgment-debtor.*] A payment, by the debtor of a judgment-debtor, to the holder of the judgment, in obedience to the order of a Judge in supplementary proceedings, is a valid payment as against an assignee of the judgment-debtor who has given no notice of the assignment.
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3. ———— *for Benefit of Creditors—Good Faith.*] The finding by the referee that the assignor, in making the assignments, had no actual design to defraud his creditors, but intended to apply his property to the payment of his debts, preferring and securing his sureties and endorsers, is a sufficient finding, in the language of the statute, that it was made in good faith, and without any intent to hinder, delay or defraud creditors.
Where the substantial findings of the referee show the assignment to be made in good faith and for a lawful purpose, it may be sustained.
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5. ———— *Public Office—Fees—Contract.*] An office in this country is not property, nor are its prospective fees the property of the incumbent, which can be sold or assigned.
The office of Street Commissioner in New York is a public office, and is not the property of the incumbent, and the right to fees or compensation does not grow out of any contract between the government and the incumbent, but for services rendered.

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A person holding an appointment of Deputy Collector of Assessments, in the city of New York, holds no contract with the government, and is legally entitled to fees only to the extent of actual service as such Deputy Collector.

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ATTACHMENT—*Foreign Corporation—Motion to vacate—Appealable Order—Receiver of Insolvent Corporation—Standing in Court.*] Where a warrant of attachment has been duly issued and served upon assets of a foreign corporation within this State, and a receiver of such corporation has been appointed, who has entered upon the duties of his office, and where such receiver appears in the Supreme Court at Special Term, and makes application for an order upon Plaintiff in attachment to show cause why such receiver should not be made a party to the proceedings in attachment, and why the warrant of attachment should not be vacated, which motion upon hearing is denied, and which denial is affirmed on appeal to the General Term,—on appeal to the Court of Appeals, held, the receiver had no standing in Court, and that his appeal should be dismissed; that such order was not an appealable one.

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ATTORNEY AND CLIENT—*Authority to appear—Right of Defendant—Ejectment—Grantee's Right to sue in name of Grantor.*] The law warrants a party in giving faith and confidence to one who by law is authorized to hold himself out as a public officer clothed with authority to represent others in the Courts.

Where an attorney appears for a party, the general rule applicable is, that a retainer will be presumed; and the adverse party, having no notice to the contrary, may act upon such presumption.

The object of Section 111 of the Code of Procedure as amended is to *limit the operation of the section as previously enacted,* not to create any new authority as between the grantor and grantee for the use of the name of the former by the latter to recover lands held in adverse possession.

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A refusal on the part of assessors to make deductions for such contingent liabilities, is an error which may be corrected by certiorari.

PEOPLE *v.* FERGUSON 347

2. ——————— *Boards of Assessors—Powers—Taxes—Error.*] Where the assessors have jurisdiction of the person, and of the subject-matter, the assessment, though erroneous, is not void.

The determination of the assessors to impose a tax at a specified rate is a judicial determination; and, though erroneous, it lays no foundation for an action at law to redress the alleged injury.

In such case the remedy is by certiorari or writ of error.

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Where the mortgagee of a chattel stipulates that the mortgagor may retain possession of the mortgaged property, he assumes the

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burden of showing the transaction to be made in good faith, and not to hinder, &c., creditors.
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CONFLICT OF EVIDENCE—*Negligence—Question for Jury.*] On an issue of negligence, it it a matter of right on the part of the Plaintiff to have the facts submitted to a jury, where there is conflicting evidence on the question of negligence, or where the fact of negligence is to be inferred from a variety of circumstances.
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2. CONTRACT—*Indebtedness — Assumption — Liability to Third Party.*] Where in a contract between A. and B., B., upon a valuable consideration received from A., promises to pay a certain sum of money to C., the latter may maintain an action for the recovery of the same.

Where a partnership owned a valuable franchise, and had rendered themselves liable to pay a certain sum of money to a third party, and on sale of their said franchise had stipulated that the purchaser should assume and pay such liability, held, that such third party might recover the same of said purchaser.

DINGELDEIN *v.* THIRD AVENUE R. R. CO. 155

3. ——— *Parol Evidence—Findings of Fact—Liquidated Damages.*] It is not competent to explain, vary or alter the effect of a written agreement by parol evidence. Nor is it competent, with such a view, to inquire into prior or contemporaneous negotiations of the parties.

If the referee does not find sufficiently the facts claimed to be in issue, it is the duty of counsel at the time to require it, and, if necessary, seek the aid of the Court below to compel it. But failing to do so, the Appellate Court can give no aid where it is claimed the findings are not sufficiently full.

COLWELL *v.* LAWRENCE 307

4. ——— *Telegram—Parol Evidence.* Where parties have met and negotiated in respect to the letting of a barge for the term of six months, and have agreed upon all the terms except as to the *price* to be paid for its use, and have parted with the understanding that the conclusion of a party as to accepting the price proposed is to be communicated by telegraph, such previous negotiations may be inquired into to explain the extent and limitation of the telegram.

Such telegram is not to be deemed a reducing of the contract between the parties to writing, and as such incapable of explanation by an inquiry into the preliminary negotiation.

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5. ——————— *Safety of Streets—Liability—Lessee of Lot on Street—Excavation.*] The streets or sidewalks in a city are for the benefit of all classes and conditions of people; and they are at liberty to regulate their conduct in respect thereto, upon the assumption that they are in good condition.

The Corporation are liable for injuries inflicted upon persons passing along the streets or sidewalks of the city, in consequence of the dangerous condition of such streets or sidewalks, whether such injury arises from some act done by the Corporation, or from some omission of duty on their part.

The lessee of premises upon which the sidewalk is out of repair, by reason of an opening therefrom into the cellar on said premises, may be liable although the premises are at the time in the occupation of a sub-tenant who had agreed to keep the walk or premises in repair.

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2. ———LIABILITY FOR — Trustees — Express Trust — Order of Court 173
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3. ———*Liability of Receiver to pay in full out of assets—Preference over General Creditors.*] In an action prosecuted by a receiver of an insolvent corporation, for the collection of an alleged money demand, for the enhancement of the fund, and for the benefit of those to whom it is ultimately to be paid, on failure to sustain such action the Defendant is entitled to his costs, to be paid to him immediately. He does not stand as a general creditor, and is not required to await the final administration, receiving only his pro rata with the other creditors.

It is not in accordance with any rule of justice or equity toward third parties that such actions should be prosecuted by a company or its representative, otherwise than at the expense and risk of the fund which is thereby sought to be increased.

The Defendant being entitled to his costs immediately from the *fund,* and the order of the Court upon the receiver being to pay such costs from the fund, it did not rest in its discretion to refuse such order.

To make such order is not giving a preference to the Defendant in the payment of a debt; it is merely requiring the fund to bear and pay the expense incurred for its own benefit or increase.

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4. COSTS—*Statute in relation to School Trustees—Certificate of Good Faith.*] Where trustees of school district are called upon to answer for acts done by them in virtue, or under color of their offices, and it appears that they have acted in good faith, they are entitled to a certificate of the Judge who tried the cause, to that effect, that they may be exonerated from the payment of costs.

And when such certificate has been granted, it is error to tax such trustees with the costs in such case.

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DEMURRER—*Grounds of Objection—Capacity to sue—Waiver—Assignment of Cause of Action—Contractor for repairing Canal—Liability.*] Where a party, by his contract bound to keep a particular section of the public canal in repair and in good navigable condition, wilfully neglects to remove obstructions to navigation on such section, and by reason whereof a party navigating said canal is damaged, said contractor is liable in a proper action for such damage.
Such cause of action against the contractor is assignable, and vests in the assignee a right to prosecute his action for such damages.
Under a demurrer to the complaint stating for cause only, that the complaint does not state facts sufficient to constitute a cause of action, the Defendant cannot object, on the hearing, that the Plaintiff has not legal capacity to sue.
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1. DISMISSAL OF COMPLAINT—*Pendency of another Suit for same Cause of Action.*] When there is no evidence furnished under the answer setting up a defence, that a suit is already pending for the same cause of action, the Court cannot presume the answer to be true.
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EJECTMENT—*Evidence of Title.*] In an action, to recover possession of the site of a school-house, where the Plaintiffs had been in possession as trustees of School District No. 5 for many years, claiming title under the deed of said site to said district in 1812, &c., as against Defendants, who had been in possession about ten years without any pretence of title, the Plaintiffs are entitled to recover.
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1. ——— *Judgment Record—Effect of Untenable Objection—Void Marriage—Joinder of Causes of Action—Election.*] Where, on the trial of an action, the record of a prior judgment is offered in evidence, and is objected to only upon frivolous or untenable grounds, all valid objections to its admissibility are thereby waived.

When a rendering of a decree of divorce is introduced in evidence, to establish the fact that the Defendant had been divorced from a wife of a former marriage, it is evidence only of such fact and of the cause for which it was granted.

In an action by the Plaintiff against Defendant for fraudulently inducing Plaintiff to marry Defendant, when Defendant was not competent to enter into the marriage contract with Plaintiff, by reason that the wife of a former marriage with the Defendant had been divorced from him by reason of his adultery, and was still living, it was held, that the second marriage being absolutely void, the Plaintiff might maintain her action against the Defendant.

Where the Plaintiff had brought her action for such fraud, and also for an assault and battery, held, that she was not required to elect upon which she would proceed, as the assault and battery might be proved in aggravation of damage, &c.

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2. ——————*Religious Belief—Life Insurance—Condition of Policy—Attending Physician.*] In an action to recover for an insurance upon the life of the deceased, it is incompetent to inquire into the religious faith of the deceased, with a view of influencing the question whether, in such case, death was occasioned by an intent of self-destruction, or of accident.

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To assume that a belief in Christianity will prevent or tend to prevent the commission of suicide, or that Atheism will tend to produce such an effect, is to adopt a principle too subtle, speculative, and remote, to be recognized in law.

To ask the assistance of one who had been the family physician, but who had long since ceased to practise, while waiting the arrival of the regular physician, who had been sent for, does not constitute the employing such ex-physician under the provisions of the policy requiring the statement of the attending physician.

GIBSON *v.* AMERICAN MUTUAL LIFE INS. CO. 261

3. ———— *Res Adjudicata.*] A judgment of a Court of competent jurisdiction is final and conclusive upon the parties thereto, in respect to all matters then litigated, or which should then have been litigated and settled.

KELSEY *v.* WARD 318

4. ———— *Summary Proceedings—Tenancy—Judgment Record in another Suit.*] Upon the question of the tenancy of the Defendant in a summary action to dispossess him, it is incompetent to introduce a judgment record in which the question of tenancy was not in issue, but was merely incidental or collateral, and was not necessarily decided by the judgment.

PEOPLE *v.* JOHNSON 299

5. EVIDENCE—*Testimony of Wife against the Husband.*] In an action by the husband for criminal conversation with his wife, it is error to permit the wife to be used as a witness for or against the husband, on the trial of the issue joined between the parties.

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2. ————*Sheriff's Liability for Interest—Failure to pay over or Deposit.*] On the receipt of an execution issued upon a judgment, the Sheriff is required to proceed to collect the debt and interest from the rendition of the judgment; and, having collected the same, it was his duty forthwith to pay over to the Plaintiff in execution, or to his attorneys, the amount so collected.

When circumstances require it, he may bring the money into Court, that the Court may order to whom it shall be paid.

But neither paying the money to the proper party in execution, nor bringing it into Court, he will be chargeable with the amount collected, and the interest due thereon from the time of the collection of the same, and the necessary costs of compelling such payment 27

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FORFEITED RECOGNIZANCE — *Excuses — Sickness.*] When a party is under a recognizance with proper sureties to appear at Court to answer, &c., and he is prevented by sickness from fulfilling the terms of his recognizance, such fact will be a good defence to an action brought upon his estreated recognizance.

Sickness of the principal is to be deemed such an act of God as to excuse the sureties from having his body before the Court, according to the terms of the recognizance.

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FORMER JUDGMENT—*Estoppel—Prospective Damages.*] Where the same embankment, the same ditches, &c., which by a former judgment have been adjudged to have caused damages to the Plaintiff, are continued, causing subsequently similar injuries, the Defendant will be estopped by such judgment from denying his

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liability in a subsequent action to recover for like subsequent injuries caused by the continuance of said embankment, &c.

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FRAUD—*Discovery—Statute of Limitations—Copartnership—Assignment by one Copartner.*] In actions for fraud the cause of action is perfect from the time of the commission of the fraud, but the Statute of Limitations does not commence to run until knowledge of the fraud is brought to the Plaintiff.

One partner cannot execute an assignment of partnership property for the benefit of creditors without the consent of his copartner.

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HOMICIDE—*Indictment—Statute of 1862—Murder—First and Second Degrees*] To charge in an indictment for murder that the prisoner committed the act "with malice aforethought," is equivalent to the averment that the act was committed "with a premeditated design to effect the death," &c.

Murder in the second degree, under the Statute of 1862 (ch. 197, p. 369), consists in killing a human being by a person engaged in the commission of a felony, where such killing does not, according to the statute, constitute murder in the first degree, or manslaughter, or excusable homicide.

Held, also, that the entire effect of the amendment of 1862 (ch. 197) was this: When the killing was perpetuated without any design to effect death, by a person engaged in the commission of a felony other than that of arson in the first degree, it was murder in the second degree.

FITZGERROLD *v.* PEOPLE..... 273

HUSBAND AND WIFE—*Deed of Separation—Consideration—Gift —Trustee—Credit to Wife—Liability of Husband.*] A gift by the husband to a trustee to hold for the use of his wife, accompanied by a transfer of the possession, is operative to vest the title in the trustee irrespective of any consideration thereof.

Where credit is given solely to the wife upon a sale to her, the husband is not liable, even though they live togother as husband and wife.

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JOINT DEBTORS—*Contribution—Corporation—Copartnership.*]
The rule that joint-debtors, &c., are severally liable to contribute each for any excess beyond his proportion paid to relieve from a common liability, is not unqualified in settling the equities between the parties themselves.

In such case, as between debtors joint in form and jointly liable to third parties, it is competent to show that one became bound for the benefit of all the others, or for his own personal benefit.

Subscription to the stock of a proposed seminary to be incorporated, does not constitute the subscribers copartners, or authorize any one to contract debts or advance money on the credit of such subscription, with a view to make the subscribers liable therefor.

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LEASE—*Covenant by Lessor to keep in Repair.* Under a covenant by the lessor that he will do all necessary repairs within a reason-time after notice to him by the lessee, he failing to do so, will be liable to the lessee for the expense incurred in making the repairs.
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2. —— *Surety—Arbitration—Substitution of Arbitrator by Principal—Liability of Surety.* Where a principal debtor has, according to terms of his original contract, submitted a matter in controversy to the determination of arbitrators, and they have awarded upon the same, his surety on said contract is liable upon said

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award, although he was not a party to the arbitration, and had no notice of the same.

When the covenant of the surety is one of general indemnity, he is concluded by the judgment against his principal touching such subject-matter, unless he can, on being let in, show that his principal had a good defence to the claim, &c.

BINSSE *v.* WOOD 42

LEGACY—*Lapse by Death of Legatee—Next of Kin—Reversionary Interest.* Where a legacy lapses through the death of a legatee during the lifetime of the testator, the subject-matter of the legacy, on the death of the testator, immediately vests in the next of kin, who, although a legatee under the will, takes absolutely the lapsed estate.

Where a revisionary interest in personal property is not disposed of by the will, it belongs to the next of kin of the decedent, who are entitled to the distributive shares of such unbequeathed interest at the death of the testator.

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MORTGAGE—*Lands in another State—Jurisdiction—Promissory Notes—Usury—Void in part.*] When a mortgage is given to secure the payment of notes, a part of which are usurious, the mortgage is void. But will not be cancelled as a cloud upon the title without the payment of the notes not usurious.
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2. ———— *Nonsuit—Facts for the Jury to determine.*] Where Plaintiff's intestate was killed by a stone hurled by a blast of rocks on Defendant's premises while intestate was crossing the same by a footpath in use for many years,—held, that he was not a trespasser on said premises, and was not to be deemed guilty of negligence for crossing said premises according to his daily custom for many years.

Held, that although the throwing of the stone by the blast, by means of which the intestate was killed, was quite unusual, yet the known possibility of such an event imposed on the Defendant the duty of warning all persons within reach of danger, that they might seek a place of safety at the time of discharging the blast.

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NEW TRIAL—*Newly-discovered Evidence Cumulative—Discretion of the Court—Appealable Order.*] A motion for a new trial on the ground of newly-discovered evidence is addressed to the discretion of the Court, and an order thereupon is not appealable.

When the newly-discovered evidence is merely cumulative, it is not such as would justify disturbing the verdict of the jury by granting a new trial.

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PLEADING—*Complaint—Joinder of Causes of Action—Demurrer—Motion to strike out Complaint.*] Distinct causes of action which may be united in the same complaint, must be separately stated, according to § 167 of the Code. But in such case distinct causes of action not being separately stated, the remedy is by motion, and not by demurrer.

An omission to separately state, by distinct counts in the same

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complaint, separate causes of action which may be joined in the same complaint, is not a misjoinder under § 172 of the Code.
BASS *v.* COMSTOCK 22

2. ———— *Complaint—Defect of Parties—Demurrer—Power of Referee to Amend.*]
PACHIN *v.* PECK 33

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———— OF REFEREE to dismiss Complaint—Practice—Stockholders' Liability for Services to Corporation 74
See PRACTICE. 3.

PRACTICE—*Case—Exceptions to Referee's Report—Findings of Fact.*] Where there are no findings of fact by the referee, or exceptions to the referee's report, contained in th case, there is nothing for this Court to review, and consequently the judgment below must be affirmed.
PHILBIN *v.* PATRICK 170

2. ————*Charge of Judge—Assault and Battery—Amount necessary to carry Costs.*] In an action for an assault and battery, it is not error for the Judge to instruct the jury as to what amount of verdict necessary to carry costs against Defendant.
See WAFFLE *v.* DILLENBECK 241

3. PRACTICE—*Dissmissal of Complaint—Powers of Referee—Stockholders' Liability for Service rendered to Corporation.*] Under the Code a referee has a right to dismiss a complaint on the ground that it does not contain sufficient facts to constitute a cause of action.
A secretary of a manufacturing corporation is not a laborer or servant of the corporation in such a sense as to render a stockholder of the corporation liable for his services as secretary, under the 18th Section of the Act authorizing the formation of manufacturing corporations (3d Edm. St. at Large, p. 736).
COFFIN *v.* REYNOLDS 74

4. ————*Supplementary Proceedings—Transcript of Judgment—Execution—Residence of Judgment-debtor—Husband and Wife—Witness.*
BINGHAM *v.* DISBROW 198

5. ————*Trustees—Express Trust—Liability for Costs—Order of Court.*]. Where Plaintiffs sue as trustees of an express trust and are defeated in the action, no execution can be issued against them *personally,* except by the express order of the Court.
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PRESUMPTION—Questions of Fact—Referee's Report..... 132
See REFEREE'S REPORT.

PRINCIPAL AND AGENT—*Fraudulent Representation—Implied Obligation—Evidence—Production of Books and Papers.*] Where a party who is bound to pay an outstanding mortgage on Defendant's land obtains the money by fraudulent representations and discharges the mortgage, the Defendant, who was neither party nor privy to the transaction, is not liable to the person furnishing the money, even though the discharge of the mortgage inures to his benefit.
HENRY *v.* WILKES..... 204

——————— SURETY—*Extension of Payment—Fraud.*] An agreement with a principal extending the time of paying the debt, to be such as will discharge the surety, must be such an one as can be enforced; that is, such an one as will prevent the collection of the original demand.
But if such agreement postponing the payment of the original debt be without consideration, or be void by reason of fraud in procuring it, the surety for the original debt will not be thereby discharged.
LOWMAN *v.* YATES..... 320

——————— Substitution of Arbitrator by—Liability of Surety—Lease 42
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PRODUCTION OF BOOKS AND PAPERS—Evidence—Principal and Agent—Fraudulent Representations—Implied Obligation.... 204
See PRINCIPAL AND AGENT.

PROMISSORY NOTE—*Consideration—Genuine Note—Infancy of Maker—Answer—Proof of Fraud.*] Under an answer which alleges as a defence, a fraudulent sale of a note with a representation that it, the note, was good, the defence is not established

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where no fraud is proved, and the representation is found to be a warrantee *that the note was genuine,* especially where it is also found that the only defect in respect to the note is, that it was made by an infant.

A note made by an infant is a sufficient consideration to sustain a promise or contract for its purchase.

BALDWIN *v.* VAN DUSEN 18

2. ——————— *Consideration—Giving up old note.*] The giving up a note past due to the maker and taking in lieu thereof a negotiable note not yet matured, postpones the immediate right of action for such original debt and makes the owner of the latter note a holder for value.

PRATT *v.* COMAN 334

3. ——————— *Endorsement—Fraudulent Representations.*]

BAUDOUINE *v.* HART 267

4. ——————— *Liability of Endorser—Presentation to Maker—Diligence.*] The rule that requires a demand of payment of a note to be made personally upon the maker thereof, or at his residence or place of business, when no place of payment is specified in the note itself, is satisfied if due and reasonable diligence is exercised in ascertaining the place of residence or of business of the maker, though without success.

HOLTZ *v.* BOPPE 110

5. ——————— *Second Endorser—Protest—Waiver.*] Where a Defendant as endorser of a promissory note can only be made liable as a *second endorser,* no act of the first endorser, waiving notice of protest after the note has become due, can charge such second endorser.

A Plaintiff taking a promissory note after maturity is not a *bonâ fide holder,* and takes it subject to all equities, &c.

BACON *v.* BURNHAM 210

——————— NOTES—Usury—Mortgage to secure, on Lands in another State—Void in part—Jurisdiction 61

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PROSPECTIVE DAMAGES—Former Judgment—Estoppel 165

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PROTEST—Promissory Note—Second Endorser—Waiver 210

See PROMISSORY NOTE. 5.

PUBLIC OFFICE—Fees—Assignment—Contract 228

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——————— OF FACT—Referee's Report—Presumption 132

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QUO WARRANTO—*Constitution—City of New York—Tax Com-*

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missioners.] This was an action in the nature of a quo warranto, to determine the validity of the law relating to the appointment of Tax Commissioners within and for the city and county of New York.

The Court held that the office of Commissioner of Taxes, in and for the city and county of New York, is a city or county office, and that the functions of such office existed, and were substantially exercised by ward assessors at the time of the adoption of the constitution of 1846, and therefore that the act of the Legislature, creating the Board of Tax Commissioners, and vesting their appointment in the Governor, with the advice of the Senate, is, to that extent unconstitutional.

PEOPLE *v.* RAYMOND 233

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RECEIVER—Liability of to pay Costs in full out of Assets—Preference over General Creditors 9
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——— OF INSOLVENT CORPORATION—Standing in Court—Attachment—Foreign Corporation—Motion to vacate—Appealable Order 14
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RECOGNIZANCE, FORFEITED—Excuses—Sickness 342
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See PRACTICE. 2.

——— *Question of Fact—Presumption.*] When the question determined by the referee is one of fact, the opinion of the referee putting a false construction upon the testimony of a witness respecting such fact does not change the question from one of fact to law; and as the judgment of the General Term, reversing the judgment upon the finding of the referee, does not state that it reversed upon an error of fact, it must be assumed that the reversal was upon an error in law.

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SECOND AND FIRST DEGREES OF MURDER—Homicide, Indictment—Statute of 1862..... 273
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SLANDER—*Privileged Communications—Evidence—Malice.*] In an action for slander, if it appear that the Defendant had just occasion for speaking the alleged slanderous words, malice is not to be presumed; a communication which would otherwise be slanderous, is privileged, if made in good faith, in respect to a matter involving the duty of the party making it.

This principle applies to an agent employed to procure information respecting the solvency, credit, or standing of another, and who communicates confidentially and in good faith to his principal the result of his investigations.—Mercantile Agency.
ORMSBY *v.* DOUGLASS..... 100

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SURETIES—*Several Obligations—Contribution—Form of Judgment.*] It is not error to allow a Plaintiff any judgment to which, upon the allegations in the complaint and the proofs, he may be entitled, either in law or equity.

The rights and obligations of sureties inter se are the same whether they are bound under one or several like obligations; and where there are several obligations, contribution between them is in proportion to the several penalties of their respective bonds.
ARMITAGE *v.* PULVER 186

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2. ———*Lands sold by State—Redemption.*] Where lands have been sold by the State Engineer on behalf of the State, the original purchaser has three months after the sale within which he may acquire title by redeeming the lands from a purchaser at such sale, when it is purchased by any one other than the State; and he may also redeem from the State, when bid in by it, by paying within that time the amount for which it was so purchased. But after the three months have elapsed, the State Engineer may sell to any person, and the right to redeem by the original purchaser ceases.
CANDEE *v.* HAYWOOD 194

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